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**Vol. I**  
**TRANSCRIPT OF RECORD**

537028  
Ch. S. S. C.

**Supreme Court of the United States**

**OCTOBER TERM, 1942**

**No. 319**

**FIDELITY ASSURANCE ASSOCIATION, A CORPORATION, DEBTOR, AND CENTRAL TRUST COMPANY, TRUSTEE FOR FIDELITY ASSURANCE ASSOCIATION, PETITIONERS,**

*vs.*

**EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST VIRGINIA, AND EX-OFFICIO INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA, ET AL**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FOURTH CIRCUIT**

**PETITION FOR CERTIORARI FILED AUGUST 30, 1942.**

**CERTIORARI GRANTED OCTOBER 12, 1942.**





# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 319

FIDELITY ASSURANCE ASSOCIATION, A CORPORATION, DEBTOR, AND CENTRAL TRUST COMPANY, TRUSTEE FOR FIDELITY ASSURANCE ASSOCIATION, PETITIONERS,

vs.

EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST VIRGINIA, AND EX-OFFICIO INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**IN DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**In Proceedings for Corporate Reorganization**

**No. 4514**

**In the Matter of FIDELITY ASSURANCE ASSOCIATION, Debtor**

**ORDER APPROVING DEBTOR'S PETITION—June 6, 1941**

This day came Fidelity Assurance Association, by James R. Fleming, its attorney, and presented its verified petition for its reorganization under chapter 10 of the Federal Bankruptcy Act; and it appearing from said petition that the debtor is unable to meet its debts as they mature, and that the debtor desires to effect a reorganization under said corporate reorganization Act, and that it is not a municipal, banking, insurance nor railroad corporation, nor a building and loan association, but is a corporation that could become a bankrupt under section 4 of the Bankruptcy Act, and has its principal assets in this district; and the Judge being satisfied that said petition of said debtor complies with said chapter 10 of the Bankruptcy Act, and has been filed in good faith:

Now, upon motion of James R. Fleming, the attorney for the petitioner, it is ordered, adjudged and decreed that the said petition be and it is hereby approved as properly filed under said chapter 10 of the Bankruptcy Act, and it is hereby determined that said petition has been filed in good faith.

It is further ordered that Central Trust Co., a corporation of Charleston, be and hereby is appointed trustee of and for the debtor and its estate, including all of its property and assets, of whatsoever kind and description and wheresoever situated.

It is further ordered that said trustee give a bond to the United States of America in the sum of \$50,000.00 for the faithful performance of its duties as such trustee, and that [fol. 3] upon the qualification of the trustee and the execution and filing of the bond aforesaid with the Clerk of this Court, said trustee shall take all of the property and assets



of said debtor, of whatsoever kind and description and wheresoever situated into his exclusive possession and control, and shall be vested with all the title and rights, subject to the same duties, and shall exercise, subject to the control of the Court and consistently with the provisions of said chapter 10, all the powers of a trustee appointed pursuant to section 44 of the Bankruptcy Act, and such additional rights and powers as a receiver in equity would have if appointed by a Court of the United States for the property of the debtor, and, subject to the authorization and control of this Court, shall carry on, manage, conduct and operate the business of the debtor in its usual course.

It is further ordered that the receivers, H. Isaiah Smith and Ross B. Thomas, heretofore appointed by the Circuit Court of Kanawha County, West Virginia, of the property and assets of said debtor situate in the State of West Virginia, be and hereby are directed and ordered to surrender and deliver to said trustee all of the property, assets and business of the debtor, of whatsoever nature and wheresoever situated, now in their possession and control; and said receivers and their agents and employees are hereby expressly enjoined and restrained from in anywise interfering with the exclusive possession and control of said trustee of said property and assets of said debtor and from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any of said property and assets.

It is further ordered that each receiver or receivers heretofore appointed by any State Court in the States of Ohio, Indiana, Illinois, Wisconsin, Kentucky, Tennessee, New York and Pennsylvania be and they are hereby directed [fol. 4] to surrender and deliver to said trustee all of the property and assets of the debtor, of whatsoever nature and wheresoever situate, now in their possession and control; and each of said receivers is hereby enjoined and restrained from in anywise interfering with the exclusive possession and control of said trustee of said property and assets of said debtor and from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any of said property and assets of said trustee.

It is further ordered that all creditors and stockholders of debtor and all other persons, firms, associations and corporations, and all persons claiming or acting by, through,

or under them, including all sheriffs and marshals and other officers, agents, attorneys, solicitors, representatives and employees of them, or any of them, and all receivers of State Courts heretofore or hereafter appointed, or any of them, are hereby enjoined and restrained from instituting, continuing or prosecuting any action at law or suit or proceeding in equity, or any other proceeding, against said debtor or trustee in any court of law or equity or other court or tribunal, or otherwise, and from executing or issuing, or causing, the execution or issuance out of any court, or any public office, of any writ, process, summons, garnishment, attachment, subpoena, replevin, execution or other proceeding for the purpose of examining or taking possession of or interfering with any property constituting the estate of the debtor, or attempting to take into their possession any part of the property constituting such estate, wheresoever situate; and all such persons, firms, associations or corporations are hereby enjoined and restrained from seizing, selling, removing, transferring, disposing of or interfering with, or attempting so to do, any property or assets of said debtor or said trustee, whether or not in their possession or otherwise, and from doing any act [fol. 5] or thing whatsoever to interfere with the possession, management and control by said trustee of debtor's assets, property and effects; and all persons, firms and corporations are hereby enjoined and stayed from commencing or continuing any judicial proceedings in any court to enforce any lien or right of any kind or character upon the estate or property of debtor until further order of this Court.

It is further ordered that said trustee is hereby vested with the power, pending further order of this Court, to conduct, manage, maintain, operate and keep in proper condition and repair all of said assets and property of said debtor, and in connection therewith to employ, discharge and fix the compensation of all agents and employees of the debtor, and to collect and receive all of the income, rents, revenues, issues and profits of said assets and property of said debtor, and to collect all outstanding accounts receivable, and generally to do any act necessary to carry on the business of the debtor, subject to such supervision and control by this Court as by further orders herein it may from time to time exercise.

4  
This court reserves full right and jurisdiction to make from time to time such orders amplifying, extending, or limiting or otherwise modifying this order as to the Court may at anytime seem proper.

Dated this 6th day of June, 1941.

Ben Moore, U. S. D. J.

(The Petition, referred to in the foregoing order, is in the words and figures as follows:)

[fol. 6] IN DISTRICT COURT OF THE UNITED STATES FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA

No. 4514

In Proceedings for Corporate Reorganization

In the Matter of FIDELITY ASSURANCE ASSOCIATION, Debtor

DEBTOR'S PETITION—Filed June 6, 1941

To the Honorable Ben Moore, Judge of the District Court of the United States for the Southern District of West Virginia:

The petitioner, Fidelity Assurance Association, the above named debtor, respectfully states:

I

The debtor, Fidelity Assurance Association, is a corporation duly organized and existing under the laws of the State of West Virginia and has had its principal assets within the above named judicial district for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district, and that its principal assets of the value of approximately \$13,000,000 are now situate in the City of Charleston, West Virginia, in said Southern District of the State of West Virginia, for more than six months immediately preceding the filing of this petition; and that said debtor was incorporated under the laws of the State of West Virginia on the 26th day of April, 1911, as Fidelity Investment Loan Association, and whose name was thereafter changed to Fidelity Investment Association, and on or about December 31, 1940, its name was again changed to Fidelity Assurance Association.

## II

The debtor is a corporation as defined in the Federal Bankruptcy Act, which could be adjudged a bankrupt under the said Act, and is not a municipal, insurance or banking corporation or building and loan association, and is not a railroad corporation, authorized to file a petition under the [fol. 7] provisions of said Bankruptcy Act.

## III

The debtor for many years was engaged in the business of selling investment or annuity contracts under a license issued by the Insurance Commissioner of the State of West Virginia, pursuant to the statutes of this state; and such contracts were sold by debtor to divers persons in West Virginia and many other states of the United States. That debtor continued actively to engage in this business until on or about the 31st day of December, 1940, at which time it ceased to actively engage in the sale of investment or annuity contracts for the reason that on August 22, 1940, an Act known as the "Investment Company Act of 1940" was enacted by the Congress of the United States and approved by the President, which Act so increased the reserve requirements on the part of debtor to contract holders that debtor found it impossible to comply with the provisions of said Act and ceased the sale of its said securities, and since said 31st day of December, 1940, its only business has been the collection of receipts and payments under said contracts and the disbursement of moneys as required under the provisions of its outstanding contracts.

That on December 31, 1940, debtor amended its charter and changed its name from Fidelity Investment Association to Fidelity Assurance Association, and changed its corporate purposes from those originally authorized to that of the issuance of life insurance policies; that debtor did not and could not comply with the requirements of the West Virginia law in reference to engaging in the life insurance business, and that debtor did not issue or sell any life insurance policies and did not engage in the insurance business; and that the only business in which debtor is now engaged is that of receiving payments on investment or annuity contracts previously sold, as hereinabove set forth, [fol. 8] and that said debtor is not now licensed to sell either insurance or investment or annuity contracts.



## IV

Debtor says that its authorized capital stock formerly consisted of 100,000 shares of preferred stock of the par value of \$100.00 per share and 30,000 shares of common stock of the par value of \$100.00 per share, and that at a stockholders' meeting held on the 24th day of January, 1941, resolutions were adopted seeking to abolish the preferred stock and reducing the par value of all stock from \$100.00 per share to \$8.00 per share; that the number of shares of preferred stock issued prior to said stockholders' meeting was 9,110 and the number of shares of common stock issued prior to said stockholders' meeting 8,123 shares; that the resolution authorizing a reduction in the par value of said stock, both common and preferred, also called for the exchange of the 9,110 shares of preferred stock outstanding, with a par value of \$100.00 per share, for 18,220 shares of preferred stock of the new par value of \$8.00 per share and for the exchange of the 8,123 shares of the \$100.00 par value common stock outstanding for 8,123 shares of common stock with a new par value of \$8.00 per share.

## V

The debtor now has in existence and outstanding investment and annuity contracts having a total reserve liability of approximately \$25,685,999.79, and it is the owner of assets of the value of approximately \$23,000,000, approximately \$13,000,000 of which is situate in the City of Charleston, in the Southern District of the State of West Virginia. A schedule containing a full and true statement of all of the assets and liabilities of debtor is filed herewith and is marked "Exhibit A".

## VI

Debtor further states that on April 11, 1941, Edgar B. [fol. 9] Sims, Auditor of the State of West Virginia and Ex-Officio Insurance Commissioner of the State of West Virginia, filed his petition in Chancery in the Circuit Court of Kanawha County, West Virginia, asking, among other things, for the appointment of a receiver or receivers for the property and assets of debtor; that on said date the Circuit Court of Kanawha County, West Virginia, in said proceeding appointed H. Isaiah Smith and Ross B. Thomas

as receivers for the assets and property of this debtor; and that H. Isaiah Smith and Ross B. Thomas are now the duly appointed, qualified and acting receivers for all of the property and assets of debtor situate in the State of West Virginia.

That thereafter independent receivers were appointed in the States of Indiana, Ohio, Illinois, Wisconsin, Tennessee, Kentucky and Pennsylvania for assets and property of the debtor situate in those states of the approximate value of \$10,000,000; and that said receivers in said states have taken charge of and are now holding the assets of debtor so situate in each of said respective states.

That other receivers may have been appointed in other states, but the above receivers are the only ones that have come to the knowledge of debtor.

## VII

Debtor further states that it now has outstanding investment and annuity contracts with reserve liabilities totaling approximately \$25,000,000, and that in these contracts debtor agrees to pay interest accumulations of from four to five per cent per annum; that the decrease in interest rates in recent years has made it impossible for debtor to invest its funds in conformance with the West Virginia law and to earn the interest requirements as set forth in its said outstanding contracts; and that by reason of said interest requirements under its said contracts debtor is now suffering an annual loss of approximately \$250,000 per annum, [fol. 10] and that this loss will continue and probably increase unless the earnings on sound securities should increase far in excess of the present rate of income.

That for the reasons above set forth debtor has been unable to meet its obligations as they mature and will be unable to meet its obligations as they mature unless the rights of its contract holders are modified so that the earnings received on securities and assets owned by debtor will be sufficient in amount to meet the requirements under its outstanding contracts; and if the rights of its outstanding contract holders are modified to this extent, debtor will be able to meet its reserve requirements and will be able to comply with the Investment Company Act of 1940 and will be enabled to resume the operation of its business.

Debtor further states that each of its existing and outstanding contracts is secured under the terms of each of its

said contracts by a reserve fund, which is on deposit with the Treasurer of the State of West Virginia and with the officials and departments of other states where the securities of debtor were sold; and that the rights of all contract holders must be modified as above set forth in order that debtor may be permitted to obtain adequate relief, and that by reason of these facts debtor cannot obtain adequate relief under chapter 11 of the Bankruptcy Act.

### VIII

Debtor further states that no plan of reorganization has been as yet formulated, and that it knows of no plan of reorganization, readjustment or liquidation affecting the property of the corporation pending either in connection with or without any judicial proceeding except that receiverships have been created in West Virginia and other states, some of which are threatening to sell the assets now in their possession.

### IX

It is the desire of debtor that a plan of reorganization [fol. 11] be effected under the provisions of chapter 10 of the Bankruptcy Act, and that the Court appoint a trustee or trustees to take charge of the assets and property of debtor wheresoever situate and to formulate and present a plan of reorganization for debtor under the provisions of chapter 10 of the Bankruptcy Act.

### X

Debtor further states that on the 3rd day of June, 1941, the Board of Directors of debtor met in special meeting pursuant to call and adopted a resolution authorizing the filing of debtor's petition, a copy of said resolution being filed herewith and attached hereto and marked "Exhibit B".

### PRAYER

Wherefore your petitioner prays:

1. That an order be entered approving the debtor's petition as properly filed;
2. That the Court immediately appoint a trustee or trustees to take charge of the assets and property of debtor and



with directions to prepare and present to the Court a plan of reorganization under the provisions of chapter 10 of the Bankruptcy Act; and

3. That your petitioner may have such further and other relief as the Court shall deem proper and necessary.

Fidelity Assurance Association. By John Marshall, Jr., Vice President.

James R. Fleming, Attorney for Debtor.

[fol. 12] *Duly sworn to by John Marshall, Jr., jurat omitted in printing.*

[fol. 13] MEMORANDUM OF CLERK

(Exhibit A (Financial Statements for the year ended October 31, 1940), is being omitted from the record at this point because same is being transmitted in original form in accordance with instructions of Court Order entered March 7, 1942.)

[fols. 14-16] EXHIBIT "B" TO PETITION

Resolution

"Whereas, Receivers have been appointed for the assets of this Corporation, situate in their respective states, by the State Courts of West Virginia, Illinois, Wisconsin, Pennsylvania, Indiana, Kentucky, Tennessee, and Ohio; and that by reason of this fact and the failure of the Receivers in those states to cooperate with the Receivers appointed for the State of West Virginia, it seems impossible to effect a reorganization of the affairs of this Corporation under existing conditions; and

Whereas, it is considered possible and feasible to effect the reorganization of this Corporation by filing a voluntary petition in Federal Court under chapter 10 of the Federal Bankruptcy Act which provides for the reorganization of corporations in situations such as this.

Now Therefore, be it resolved that it is the desire of this Corporation that the Corporation file a voluntary petition for reorganization of its affairs under chapter 10 of the Federal Bankruptcy Act in the proper Federal Court, having jurisdiction of this proceeding and that all necessary

steps be taken under said Act to reorganize the fiscal affairs of this Corporation, and that a plan be effected to reorganize its corporate affairs as provided under said chapter 10 of said Federal Bankruptcy Act.

And Be It Further Resolved that John Marshall, Jr., be directed and fully authorized to file a petition in the proper Federal Court in behalf of this Corporation under chapter 10 of the Federal Bankruptcy Act."

This is to certify that at a special meeting of the Board of Directors of the Fidelity Assurance Association of Wheeling, West Virginia, held at the William Penn Hotel in Pittsburgh, Pennsylvania, on Tuesday, June 3, 1941, in pursuance to notice duly given, the above Resolution was adopted.

(signed) A. L. King, Secretary. (corporate seal.)

[fol. 17]

IN UNITED STATES DISTRICT COURT

[Title omitted]

**ORDER AUTHORIZING EMPLOYMENT OF JAMES R. FLEMING AND  
ALLEN G. MESSICK FOR SPECIAL SERVICES**

Comes now Central Trust Company, Trustee herein, and files its petition requesting authority under section 157 of the Federal Bankruptcy Act to employ James R. Fleming, the attorney of record for the debtor herein, and Allen G. Messick, Chairman of the Board of Directors of debtor herein, for special employment, as set forth in said petition, during the period of the administration of the trust.

And the Court having examined said petition and being fully advised in the premises now grants said petition and authorizes said Trustee to employ said James R. Fleming and Allen G. Messick for the performance of such special services as required by said Trustee in the administration of this trust and as set forth in said petition.

Dated this 7th day of June, 1941.

Ben Moore, U. S. D. J.

(The Petition, referred to in the foregoing order, is in the words and figures as follows:)

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AUTHORITY TO EMPLOY JAMES R. FLEMING AND  
ALLEN G. MESSICK FOR SPECIAL SERVICES—Filed June 7,  
1941

To The Honorable Ben Moore, Judge Of The District Court  
Of The United States For The Southern District Of West  
Virginia:

Comes now Central Trust Company, Trustee herein, and respectfully shows the Court that your Trustee deems it advisable and necessary to employ James R. Fleming, the attorney for the debtor herein, and Allen G. Messick, Chairman of the Board of Directors of said debtor, for the purpose of assisting your Trustee in marshalling the assets of said debtor which are now situate in divers states outside the territorial limits of the State of West Virginia, and also for the purpose of assisting Trustee in the development and formulation of a plan or reorganization for the affairs of debtor in this proceeding, and that your Trustee be also authorized by the Court to employ the above named to perform any other special services other than that of general counsel for the Trustee in the administration of this trust; and that this authority is requested under section 157 of chapter 10 of the Federal Bankruptcy Act.

Wherefore your petitioner prays the Court for an order authorizing this Trustee to employ the said James R. Fleming and Allen G. Messick to perform such special services for this Trustee as hereinabove set forth.

Central Trust Company. By Andrew A. Payne, Executive Vice President and Trust Officer.

[fol. 19] *Duly sworn to by Andrew A. Payne, jurat omitted in printing.*

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CLARIFYING AUTHORITY AND DUTIES OF TRUSTEE—June  
10, 1941

This day came the Central Trust Company, heretofore appointed and qualified to act as Trustee for the debtor in

this cause, and presented to the Court its motion, in writing, moving the Court that the order heretofore entered herein on June 6, 1941, approving the debtor's petition be amended and clarified in that portion thereof pertaining to the delivery of assets of the said Fidelity Assurance Association to the said Trustee.

Upon consideration whereof, and the Court having inspected said written motion, and the said written motion appearing in all respects proper, the same is ordered filed; and it appearing to the Court that good cause is now shown for the amendment of said order, and the Court being of opinion that the said order should be so amended and clarified, it is accordingly adjudged, ordered and decreed that the following named persons and officials, to-wit:

S. Leigh Call, c/o Gillespie, Burke & Gillespie, 508 Reisch Building, Springfield, Illinois.

Charles R. Fisher, c/o State Auditor's Office, Des Moines, Iowa.

Richard T. James, Auditor, State of Indiana, Indianapolis, Indiana.

Hon. Richard McIntyre, Special Attorney, State Corporation Commission, Topeka, Kansas.

John A. Lloyd, Division of Insurance, Columbus, Ohio.

Peter F. Hagan and I. H. Krekstein, c/o Hirschwald, Goff & Rubin, 808-18 North American Building, Broad Street below Chestnut, Philadelphia, Pennsylvania.

[fol. 21] Tom B. Willson and N. J. Lippard, 421 Frick Building, Pittsburgh, Pennsylvania.

Howard L. Smith, c/o Banking Commission, Madison, Wisconsin.

Dewey S. Godfrey, Suite 525, 705 Olive Street, St. Louis, Missouri.

State Securities Commission, Robert Harris, Secretary, Montgomery, Alabama.

Securities Commission, Dover, Delaware.

Secretary of State, Springfield, Illinois.

Commissioner of Insurance, Securities Commission, Indianapolis, Indiana.

Securities Commissioner, Des Moines, Iowa.

Commission of Securities, Securities Division, Topeka, Kansas.

Division of Securities, Frankfort, Kentucky.

Insurance Commissioner, State Insurance Department of Maryland, Baltimore, Maryland.

Securities Commissioner, Jefferson City, Missouri.

Securities Commissioner, Columbus, Ohio.

Pennsylvania Securities Commission, Harrisburg, Pennsylvania.

Commissioner Department of Insurance and Banking, Nashville, Tennessee.

G. A. Bowles, Commissioner of Insurance, and C. M. Chichester, Director, Securities Division, Richmond, Virginia.

Insurance Commissioner, Charleston, West Virginia.

Securities Commissioner, Madison, Wisconsin.

Securities Commissioner, Tallahassee, Florida,

all persons heretofore designated either by name or official [fol. 22] position, and all other persons and officials not herein specifically named, who may have in their possession, custody or control, any assets, stocks, bonds, debentures, money, choses in action, real estate, personal property, or property of other kind or character, belonging to said debtor, shall forthwith surrender and deliver all such property to said Trustee; and all said persons and officials are hereby enjoined and restrained from in anywise interfering with the exclusive control and possession by said Trustee of said property and assets of said debtor, and are further enjoined and restrained from selling, assigning, concealing, encumbering, transferring, or otherwise disposing of or affecting any of said property and assets of said debtor.

It is further ordered and decreed that any and all property heretofore placed in the possession, custody or control of any state official by the Fidelity Assurance Association, the Fidelity Investment Association, or the Fidelity Investment Loan Association, whether the same be in the



form of stocks, bonds, debentures, money, or other form, for the purpose of securing the creditors or contract holders of the said Fidelity Assurance Association, Fidelity Investment Association, or Fidelity Investment Loan Association against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other purpose, is hereby adjudged for the purposes of this order to be assets of the debtor herein and subject to this order.

Ben Moore, U. S. D. J.

(The Motion, referred to in the foregoing order, is in the words and figures as follows:)

[fols. 23-27] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR ORDER CLARIFYING AUTHORITY AND DUTIES OF  
TRUSTEE—Filed June 10, 1941

To the Honorable Ben Moore, Judge of the District Court  
of the United States for the Southern District of West  
Virginia:

Your Trustee in the above cause, Central Trust Company, now comes and respectfully shows unto Your Honor that the order heretofore entered herein approving the petition of the debtor does not name specifically the Receivers in the various states, who have in their custody and control assets of the debtor herein, and that the said order likewise fails to state specifically the names and official designations of the various state officials having custody and control of securities deposited in their respective states for the protection of contract holders. Your Trustee would further show unto the Court that the aforesaid order does not with sufficient clearness adjudge that securities deposited with the state officials in the various states wherein the debtor sold contracts for the purpose of securing the purchasers of said contracts against loss are property of the debtor herein and therefore subject to the control of this Trustee.

Your Trustee therefore respectfully moves the Court that said order be amended and clarified in the above particulars.

Central Trust Company, Trustee, by Counsel.

Townsend & Townsend, Counsel.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING MOTION—June 12, 1941

On the 9th day of June, 1941, came Ross B. Thomas and H. Isaiah Smith, by Koontz & Koontz, their attorneys, and related unto the Court that they were Receivers of the above named debtor, duly appointed by the Circuit Court of Kanawha County, West Virginia, and were served with a copy of the order of this Court entered June 6, 1941, demanding that certain assets of the debtor in their possession be turned over to the trustee appointed by this Honorable Court, and further enjoining and restraining them from further action as such Receivers, and thereupon ask the Court for permission to intervene in this cause and to file immediately a motion in this cause, and at a later time to file an answer and any other such proper pleadings as may be deemed necessary by them, and the Court thereupon granted to said Receivers such authority to intervene and to file any and all such proper motions, answers and pleadings as they may deem necessary.

Thereupon said Receivers, by their counsel, tendered for filing, in writing, a motion, which said motion is ordered by the Court filed, said motion asking a stay for a reasonable period of the execution and enforcement of the order of June 6, 1941, in so far as it relates to their turning over to the Trustee all of the assets and property of the debtor in their possession, and that such stay be had until certain legal matters going to the venue and jurisdiction of this Court and to the propriety of said order of June 6, 1941, be settled and determined; and the Court having heard arguments on said motion by the attorneys [fol. 29] for the said Receivers as well as by Townsend & Townsend, attorneys for the said Trustee, and having considered the matter fully, and being of opinion that any delay in the execution and enforcement of said order of June 6, 1941, would unduly restrict and hamper the Trustee in performing its duties thereunder, particularly with respect to assets of the debtor located outside the State of West Virginia, and for other reasons satisfactory to the Court, is of the opinion to and doth hereby refuse to grant the said motion, to which the said Receivers, by counsel, except.



And as to the several questions raised by said receivers in their said motion, the Court reserves its action thereon until such time as such questions shall be properly brought before the Court by appropriate motion or other suitable pleading.

And the said Receivers thereupon moved the Court that they be given a reasonable time within which to file their proper answer or other pleadings in this case, and there being no objection thereto, said motion is by the Court ordered granted.

Enter: Ben Moore, United States District Judge.

(The Motion, referred to in the foregoing order, is in the words and figures as follows:)

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION BY ROSS B. THOMAS AND H. ISAIAH SMITH, RECEIVERS OF DEBTOR—Filed June 12, 1941

On the 9th day of June, 1941, come, now Ross B. Thomas and H. Isaiah Smith, by Koontz & Koontz, their counsel, and relate unto the Court that they are the Receivers of Fidelity Assurance Association, duly appointed by the Circuit Court of Kanawha County, West Virginia, in a proper suit brought by Edgar B. Sims, Auditor and Ex-Officio Insurance Commissioner of the State of West Virginia, and that they duly qualified as such Receivers, on the 11th day of April, 1941, by giving bond in the amount of \$50,000.00 each, and that acting as such Receivers they have taken over all of the property and assets of the aforesaid debtor in the State of West Virginia, except that in the possession of Edgar B. Sims, as Auditor and Ex-Officio Insurance Commissioner of the State of West Virginia; that in an order entered in this Court on the 6th day of June, 1941, they are ordered to turn over all property and assets of the debtor in their possession to Central Trust Company, of Charleston, West Virginia, as Trustee of said debtor, and are enjoined from proceeding further or acting in said suit in Kanawha County, West Virginia.

Therefore, said Receivers, by counsel, move the Court that the execution or enforcement of said order of June 6, 1941, as it affects said Receivers, be stayed for a reasonable

period of time, until proper legal proceedings may be had to determine certain questions of law and equity, which go to the merits of the said order of June 6, 1941, and which question the legal validity of said order, and further raise the question as to whether the said suit is laid in the proper venue, and whether this Honorable Court has jurisdiction to act in the matter.

The following questions are raised by said Receivers, who maintain and submit that said order should be stayed until a legal determination is had of the matters raised by said questions:

1. The Court having failed to notify the Securities Exchange Commission of said proceeding before appointing [fol. 31] the Trustee, is the order for the appointment of the Trustee therefore void on its face?

2. Certain monies having been paid by contract holders of the debtor to these Receivers in trust, under the definite promise that the monies should be returned intact without charge for any expenses if reorganization fails and liquidation ensues, should not the order be modified so as to exempt specifically these funds?

3. Were the principal assets of the defendant, within the meaning of the Bankruptcy Act and Chapter 10 thereof, in the Southern District of West Virginia for a period of six months prior to the filing of the petition?

4. Is not the order void requiring the State Auditor of West Virginia to turn over to the Trustee the securities required by law to be deposited with him, and enjoining and restraining the said State Auditor from further action, because this is in effect a suit against the State of West Virginia and an interference with the discretionary administrative powers of an officer of the State of West Virginia; and is not the said order so void as to these Receivers appointed at his instance, who are in effect only his agents to hold the assets they possess for and on behalf of the said Auditor?

5. Was the petition filed in good faith as a factual matter; in view of Section 146(3) of Chapter X, was the petition filed in good faith; and in view of Section 146(4), was the petition filed in good faith?

Your petitioners respectfully represent unto the Court that these questions are so substantial and go to the merits of the matters involved that until there is a legal determination of these matters, there should be no change in the status quo as it now exists.

Respectfully submitted, Ross B. Thomas and H. Isaiah Smith, Receivers, By Counsel.

Kontz & Koontz, Counsel for Receivers.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION—June 13, 1941

On the 9 day of June, 1941, came Edgar B. Sims, Auditor of the State of West Virginia and Ex-Officio Insurance Commissioner of the State of West Virginia, by Clarence W. Meadows, Attorney General of West Virginia, and Ira J. Partlow, Assistant Attorney General, and represented unto the Court that he, the said Sims, is the party plaintiff in a chancery cause pending in the Circuit Court of Kanawha County, West Virginia, against the above-named debtor, Fidelity Assurance Association, a corporation, which said cause was instituted by him pursuant to the statutes of West Virginia in such cases provided, and that he has been served with a copy of an order of this Court entered June 6, 1941, demanding that certain alleged assets of the debtor, being assets deposited with the Treasurer of the State of West Virginia by said debtor for the protection and benefit of contract holders of the debtor in the State of West Virginia, be turned over to the Trustee appointed by this Honorable Court in this proceeding, and enjoining and restraining him from any further action with respect to the assets of said debtor; whereupon, the said Edgar B. Sims, Auditor of the State of West Virginia and Ex-Officio Insurance Commissioner of the State of West Virginia, by counsel, requested permission of the Court to intervene in this cause and to forthwith file a motion therein, and at such later time as might appear proper, to file such answers or such other pertinent or necessary pleadings or pleas as may be deemed appropriate; whereupon, the Court granted [fol. 33] to the said Edgar B. Sims, Auditor of the State of West Virginia and Ex-Officio Insurance Commissioner of

the State of West Virginia, such right and authority to intervene herein at this time and to file hereafter any and all such proper motions, answers, pleas or pleadings as may seem necessary and appropriate.

Thereupon, the said Edgar B. Sims, Auditor, etc., by counsel, tendered and asked leave to file a motion in writing, which said motion is ordered filed and is filed, the same praying for a stay for a reasonable period of time of the execution and enforcement of the order of this Honorable Court entered on the 6 day of June, 1941, insofar as it relates to the turning over to the Trustee of all the alleged assets and property of the debtor in his, the said Sims' possession, and that such stay be in effect until certain legal phases of this case relating to the venue and jurisdiction of this Court and to the justness and propriety of said order of June 6, 1941, be legally determined and settled; and the Court having heard arguments on said motion by counsel for Edgar B. Sims, Auditor, etc., as well as by Townsend and Townsend, attorneys for the said Trustee, and having fully considered the matter and being of the opinion that any delay in the execution and enforcement of said order of June 6, 1941, would unduly restrict and hamper the Trustee in performing its duties thereunder, particularly with respect to assets of the debtor located outside the State of West Virginia, and for other reasons satisfactory to the Court, is of the opinion to and doth hereby refuse to grant said motion, to which action of the Court the said Edgar B. Sims, Auditor, etc., by counsel, objected and excepted.

As to the several questions raised by the said Edgar B. Sims, Auditor, etc., in his said motion, the Court reserves [fol. 34] any further action thereon until such time as such questions shall be again brought before the Court by appropriate motion or other suitable pleading.

Whereupon, the said Edgar B. Sims, Auditor of the State of West Virginia and Ex-Officio Insurance Commissioner of the State of West Virginia, by counsel, moved the Court that he be given a reasonable time within which to file his proper answer or other pleadings in this case, and there being no objection thereto, said motion is sustained and such leave granted.

Enter:

Ben Moore, United States District Judge.



The Motion, referred to in the foregoing order, is in the words and figures as follows:)

[fol. 35]      IN UNITED STATES DISTRICT COURT

[Title omitted]

**MOTION OF EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST VIRGINIA AND EX-OFFICIO INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA—Filed June 13, 1941**

On the 9 day of June, 1941, came Edgar B. Sims, Auditor of the State of West Virginia and Ex-Officio Insurance Commissioner of the State of West Virginia, by counsel, representing unto the Court that he is the party plaintiff in a chancery cause pending in the Circuit Court of Kanawha County, West Virginia, against the above-named debtor, Fidelity Assurance Association, a corporation, which said suit was filed by him pursuant to the lawful powers, duties and authority provided in the statutes of the State of West Virginia, with respect to his supervision, control and direction of companies of the nature of said Fidelity Assurance Association, a corporation, and which suit was instituted in entire good faith and for the one and only purpose of protecting the contract holders of contracts with said Fidelity Assurance Association, a corporation, insofar as he, the said Edgar B. Sims, as Auditor and Ex-Officio Insurance Commissioner aforesaid, might be able so to do under the statutes of West Virginia and the authority and powers of the courts of West Virginia, particularly with reference to the proper administration of the assets deposited with the Treasurer of the State of West Virginia under the administrative control and supervision of the State Auditor and Ex-Officio Insurance Commissioner of said State, by said Fidelity Assurance Association, a corporation, for the protection and benefit of West Virginia holders of contracts with said Fidelity Assurance Association, a corporation; that in an order entered in this Court on the 6 day of June, 1941, he, the said Edgar B. Sims, as Auditor and Ex-Officio Insurance Commissioner of West Virginia, has purportedly been ordered by this Court to desist and stay any and all proceedings instituted

by him in this regard, and said order on the face thereof purports to command that he, the said Auditor and Ex-Officio Insurance Commissioner as aforesaid, turn over all [fol. 36] property and assets of the above debtor in his possession to Central Trust Company, of Charleston, West Virginia, as Trustee for said debtor.

The said Edgar B. Sims, as Auditor and Ex-Officio Insurance Commissioner of West Virginia, by counsel, conceiving that grave questions of jurisdiction, venue and power of this Honorable Court may be involved with respect to the proceedings here instituted, now moves the Court that the execution and enforcement of said order of June 6, 1941, as it affects the said Edgar B. Sims, as State Auditor, etc., be stayed for a reasonable period of time until proper legal proceedings may be had to determine such questions of law and equity which may go the merits of said order of June 6, 1941, and to the legal validity thereof as to venue, jurisdiction and good faith.

As specific grounds for said motion, the said Edgar B. Sims, as Auditor, etc., respectfully submits that the following questions present themselves and should be fully considered by this Honorable Court and legally determined before said order of June 6, 1941, should be allowed to become fully effective in all respects:

1. The Securities and Exchange Commission was not notified of these proceedings as is provided by Federal law.

2. Prior to April 11, 1941, the only assets, which might in any manner be said to be those of the debtor in the Southern District of West Virginia, were certain securities which he, the said Edgar B. Sims, as Auditor, etc., required the debtor to deposit with the State Treasurer of West Virginia in trust for the benefit of said debtor's contract holders in the State of West Virginia, and which, under the provisions of law providing for such deposits in trust, and by the very nature thereof, are in effect constructively, if not actually, the property of said contract holders rather than that of said debtor; wherefore, the Southern District of West Virginia, not being the place of the principal office of said debtor and there being no assets of any appreciable value of the debtor therein, this Court is without jurisdiction in this proceeding.

3. Said order may be in effect an order against the sovereign State of West Virginia inasmuch as the Auditor and Ex-Officio Insurance Commissioner of said State is acting [fols. 37-40] in a purely official manner in this matter, and has in no wise, in the proceeding instituted in the Circuit Court of Kanawha County, acted as an individual or contrary to the statutes of West Virginia.

4. A serious question of good faith arises in this matter, actually and by Federal statute. Upon information and belief it is stated that the stockholders who have instituted this proceeding are the holders of stock utterly worthless and which cannot in any manner be made more valuable by any proceeding had here; that Section 146(3); Chapter X, of the Bankruptcy Act requires that it must be reasonable to expect a plan of reorganization to be effected when on the other hand every indication seems to point that it is entirely unreasonable to expect that such a plan can be effected, and certainly no plan which, considering the financial condition of the debtor, could in any way inure to the benefit of the stockholders as such; further, it is believed that the suit instituted in the Circuit Court of Kanawha County, West Virginia, now pending, is proper and one in which the interests of the creditors of the debtor would be best served, and hence under Section 146(4) of said Chapter X, of the Bankruptcy Act, the said Edgar B. Sims, as State Auditor, etc., should be allowed to proceed in said suit brought by him.

It is respectfully represented unto the Court that these questions are so substantial and go to the merits of the matters and things involved to the extent that until there is a legal determination thereof the order of June 6, 1941, should be stayed until such time.

Respectfully submitted, Edgar B. Sims, Auditor of the State of West Virginia and Ex-Officio Insurance Commissioner of the State of West Virginia,  
By Counsel.

Ciarence W. Meadows, Attorney General; Ira J. Partlow, Assistant Attorney General, Of Counsel.



[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF INTERVENTION BY SECURITIES & EXCHANGE COM-  
MISSION—June 13, 1941

Request therefor having been duly made by me, pursuant to Section 208, of Chapter X of the Bankruptcy Act as amended, it is hereby

Ordered that the Securities & Exchange Commission be and it hereby is requested to file a notice of its appearance herein, and thereupon it shall be deemed to be a party in interest with the right to be heard on all matters arising herein, and shall be deemed to have intervened in respect of all matters herein with the same force and effect as if a petition for that purpose had been allowed by me; and it is further

Ordered that the Clerk of this Court be and he hereby is directed to accept no papers for filing or entry herein unless at the time such papers are tendered therefor two extra copies of such papers are delivered to said Clerk for service upon the Securities & Exchange Commission; and it is further

Ordered that the Clerk of this Court be and he hereby is authorized, empowered and directed forthwith to serve upon Edmund Burke, Jr. and Justin N. Reinhardt, attorneys for the Securities & Exchange Commission, at their office, No. 718-18th Street, N. W., Washington, D. C., two copies of each paper tendered for filing or entry herein; and it is further

Ordered that such service by the Clerk of this Court shall be in addition to and not in lieu of any and all notices or other documents required to be served by the parties herein upon the Securities & Exchange Commission in accordance with Section 265 a, of Chapter X of the Bankruptcy Act as amended, June 13, 1941.

Ben Moore, United States District Judge.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

**NOTICE OF APPEARANCE AND DEMAND—Filed June 13, 1941**

Please Take Notice that the Securities and Exchange Commission hereby appears in this proceeding and requests that copies of all papers and notice of all matters arising herein be duly served on the undersigned at the address hereunder noted in accordance with Section 265(a) of Chapter X of the National Bankruptcy Act, as amended, and General Order 52 of General Orders in Bankruptcy of the Supreme Court of the United States, as amended.

Dated, Washington, D. C., June 12, 1941.

(S.) Edmund Burke, Jr., Justin N. Reinhardt, Attorneys for Securities and Exchange Commission, Office and P. O. Address, No. 718-18th Street, N. W., Washington, D. C.

To: Ira H. Motteshead, Clerk U. S. District Court for the Southern District of West Virginia; Central Trust Company, Charleston, West Virginia; James R. Fleming, Esq., 903 Old First Bank Building, Fort Wayne, Indiana; Allen G. Messick, Esq., 600 Bankers Bldg., Chicago, Illinois; Austin Wood, Esq., Board of Trade Building, Wheeling, West Virginia; Townsend and Townsend, 511 Kanawha Valley Bldg., Charleston, West Va.; Koontz & Koontz, Union Building, Charleston, West Va.; Clarence W. Meadows, Attorney General of W. Va., Charleston, West Va.

Filing Approved, June 13, 1941.

(S.) Ben Moore, United States District Judge.

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

**ORDER TO SEGREGATE, ETC.—June 14, 1941**

This day came the Trustee herein and represented unto the Court that there have arisen certain questions concerning the custody and disposition of funds of the debtor now

in the custody of the Receivers heretofore appointed by the State Court; and it appearing to the Court from said representations of the Trustee, and from statements of counsel, that heretofore, to-wit, on April 11, 1941, there was instituted in the Circuit Court of Kanawha County, West Virginia, a certain equity suit, wherein Edgar B. Sims, Auditor and Ex-Officio Insurance Commissioner of West Virginia, was plaintiff, and the debtor herein was defendant, and wherein Ross B. Thomas and H. Isaiah Smith were appointed Receivers for said debtor; and it further appearing that prior to the institution of said suit, to-wit, on April 4, 1941, the said Sims, who then had under consideration the affairs of the debtor but had not yet reached a final decision as to what proceedings to institute, ordered said debtor herein to segregate the payments received from the debtor's installment contract holders on and after April 4, 1941, which was done, said payments being segregated by said debtor and placed in the National Exchange Bank of Wheeling, West Virginia, in a special account known as "F. S. Risley Special Account"; that upon the appointment of the Receivers on April 11, 1941, as aforesaid, a provision was contained in the order of appointment as follows:

"Third. That the said Receivers be and they hereby are authorized to collect the income, tolls, rents and profits of the said property, to accept or receive installment payments from holders of the defendant's annuity contracts, certificates and bonds becoming due on and after this date, provided, however, that said Receivers shall segregate all such payments and shall deposit the same in a bank account separate and apart from all other funds and income of the defendant, and hold the same subject to the further order and directions of this Court;"

and that pursuant to said order the said Receivers so collected monthly payments from debtor's installment contract holders and segregated the same from other funds of the company and deposited the same in the National Exchange Bank of Wheeling in an account known as "H. Isaiah Smith and Ross B. Thomas, Receivers for Fidelity Assurance Association, F. S. Risley Special Account", which said account is now being maintained and contains the sum of \$167,900.35; that upon the appointment of the Receivers aforesaid the said "F. S. Risley Special Account" was transferred to the Receivers and is now main-

tained by them, but has since been transferred to the Charleston National Bank, where it is designated "H. Isaiah Smith and Ross B. Thomas, Receivers, Fidelity Assurance Association, Special Accounts Nos. 1, 2, 3, 4, 6, 9", which together contain the sum of \$111,019.05; that on May 13, 1941, the aforesaid Receivers filed a report in the Circuit Court of Kanawha County, wherein they represented to the Court that they had received numerous inquiries as to the disposition of monthly installment contract payments made by contract holders subsequent to the receivership, and particularly whether said payments would be subject to the costs of the administration of the receivership; whereupon the said Circuit Court, on May 13, 1941, entered its order, the pertinent portion of which is as follows:

“ . . . it is adjudged, ordered and decreed:

1. That H. Isaiah Smith and Ross B. Thomas, Receivers, be, and they are hereby directed to maintain in separate accounts in their names the sums received by them in payment of contract installments from the defendant's contractholders held pursuant to Paragraph Third of Order No. 1 entered herein on the 11th day of April, 1941, and the net sums heretofore paid in to the escrow account designated 'F. S. Risley, Special Account,' which was ordered set up by the Insurance Commissioner of the State of West [fol. 45] Virginia, and subsequently taken into possession by the Receivers.

2. That all payments made by contractholders other than holders of Series B Contracts in which Section 6 and not Section 7 thereof, providing insurance protection, is effective, shall be held by the Receivers in the two special accounts designated in Paragraph (1) hereof provided for the purpose, and in event of ultimate liquidation of the defendant association said payments shall be returned intact, but without interest, to the contractholders who made the same, subject to no expenses of receivership or other deductions of whatsoever kind and character, whether the same shall have been received by the Association during the period from April 4th, 1941, to April 11th, 1941, and deposited in the 'F. S. Risley Special Account', or shall have been, or may hereafter be received by the Receivers on or subsequent to April 11th, 1941, and deposited in their special account provided for the purpose; and that all in-

installment payments received as aforesaid from holders of the defendant's Series B Contracts, in which Section 6, providing insurance protection, and not Section 7, is effective, and deposited as aforesaid, shall in the event of ultimate liquidation of the Association likewise be returned intact, but without interest, to the contractholders who made the same, subject to no expenses or receivership or other deduction of whatsoever kind and character, except that there shall be deducted from the amount paid to each such contractholder the premiums actually paid to the insurance companies providing such insurance protection in respect of his contract • • •”;

that subsequent to the entry of said order the contract holders of the debtor who made payments subsequent to said receivership were notified of the provision made for returning to them the payments made by them subsequent to the receivership as provided by the aforesaid order, and that the payments so made by said contract holders and received by the said Receivers were and are now deposited in the aforesaid separate bank accounts; that the question has been raised by Ross B. Thomas, Receiver aforesaid, concerning his liability to said installment contract holders who have made payments subsequent to the receivership and under the terms and conditions aforesaid in case he now delivers said funds to this Trustee under the order entered herein on June 6, 1941. Said Trustee further represented to the Court that certain contract holders of the debtor who had obtained loans on their contracts prior to the receivership have, since said receivership, paid the [fol. 46] interest requirements on said loans in order to prevent a forfeiture of such portion of the cash values of their contracts as remain with the Association over and above the amounts of their loans, and that many of said contract holders now desire to know whether said amounts so paid as interest on their loans will be returned to them intact in case of ultimate liquidation of the Association or will be commingled with the debtor's general funds.

Upon consideration of all of which, and it appearing to the Court that an order should now be entered upon the questions presented herein, it is adjudged, ordered and decreed:

1. That the Trustee herein shall segregate and keep in separate accounts on its books the funds delivered to it



from the aforesaid Receivers which have heretofore been deposited in the bank accounts designated as "F. S. Risley, Special Account" and "H. Isaiah Smith and Ross B. Thomas, Receivers for Fidelity Assurance Association, F. S. Risley, Special Account"; that all payments made by contract holders between April 4, 1941, and August 5, 1941, inclusive, be held by said Trustee in separate accounts aforesaid, and that all contract holders who have made payments between said dates shall be permitted, upon request, to withdraw the same in accordance with the order of the Circuit Court aforesaid. Notice of such right of withdrawal shall be given said contract holders who have so made such payments by the Trustee on or before July 5, 1941, and such withdrawals shall be permitted only by those contract holders who elect to do so and who notify the Trustee of such election on or before August 5, 1941; and all payments so made between April 4, 1941, and August 5, 1941, and not withdrawn as hereinabove provided shall be held by said Trustee and administered the same as payments received on or after August 5, 1941, as hereinafter provided; that payments made by contract holders on and after August 6, 1941, be segregated by said Trustee and maintained in another separate account, and in the event no [fol. 47] plan of reorganization is adopted and approved by the Court and approved by two-thirds of the class of contract holders affected thereby, such installment payments shall be returned intact, and subject to none of the costs or expenses of this proceeding, to the contract holders who make said payments, but without interest, except, however, that in the case of contract holders holding Series B Contracts in which section thereof, providing insurance protection, and not section 7, is effective, such installments shall be so returned to each such contract holder after there has been deducted therefrom the amounts actually paid in premiums to the insurance companies which provided the insurance in respect to his contract.

2. That the Trustee herein shall segregate and keep on its books another separate account wherein shall be credited all money paid to it by contract holders of the debtor as interest on loans heretofore obtained by said contract holders on their contracts, which shall be held in such separate account subject to the further order of this Court.

Ben Moore, U. S. D. J.

[fols. 48-57] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING ANSWER OF EDWARD W. DRIEHORST, ET AL.,  
CREDITORS CONTROVERTING THE ALLEGATIONS OF DEBTOR'S  
PETITION—June 23, 1941

This 23rd day of June, 1941, came on the above matter and it now appearing to the Court that Edward W. Driehorst, H. C. Ogden, Trustee for Frances Ogden Stubblefield, H. C. Ogden, Trustee for Margaret Lawson Stubblefield, H. C. Ogden, Trustee for Anne McEwen Stubblefield, Charles E. Bates, Trustee for Eugenia C. Bates, Ohio Valley Lithographing Co., Mary V. Nager, Mrs. A. L. Jones, Edwin C. Jepson, George C. Dannenberg or Emily K. Dannenberg, Trustee for George C. Dannenberg, Jr., and George S. Kender, on behalf of themselves and all other persons similarly situated, creditors of the Fidelity Assurance Association, the abovenamed debtor, have this day tendered for filing their answer controverting the allegations of the petition heretofore filed in this proceeding upon the 6th day of June, 1941, under the terms and provisions of Section 137 of Chapter 10 of the Acts of Congress relating to bankruptcy, as amended, it is, upon motion of Austin V. Wood and Charles P. Mead, their attorneys, Ordered that said answer controverting the allegations of said debtor's petition be and the same is hereby ordered filed herein.

Ben Moore, United States District Judge.

[fol. 58] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER COUNTERMANDING AUTHORITY OF THE TRUSTEE TO EM-  
PLOY ALLEN G. MESSICK FOR SPECIAL SERVICES

This day came the Central Trust Company, Trustee herein, and filed its petition, requesting that its authority heretofore granted herein by order entered June 7, 1941, authorizing the said Trustee to employ one Allen G. Messick for special services during the period of the administration of this trust be countermanded.

And the Court having examined said petition and being fully advised in the premises now grants said petition, and hereby revokes and countermands the authority heretofore granted the Trustee to employ the said Allen G. Messick for the performance of such special services as required by the Trustee in the administration of this trust.

Dated this 24th day of June, 1941.

Ben Moore, U. S. D. J.

(The Petition, referred to in the foregoing order, is in the words and figures as follows:)

[fols. 59-60] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AUTHORITY TO DISPENSE WITH THE SERVICES OF  
ALLEN G. MESSICK—Filed June 24, 1941

To The Honorable Ben Moore, Judge Of The District Court  
Of The United States For The Southern District Of West  
Virginia:

Now comes the Central Trust Company, Trustee herein, and respectfully shows the Court that under an order heretofore entered herein on June 7, 1941, your Trustee was authorized and empowered by the Court, pursuant to section 157 of chapter 10 of the Federal Bankruptcy Act, to employ one Allen G. Messick, Chairman of the Board of Directors of said debtor, for special services for the purpose of assisting your Trustee in marshalling the assets of said debtor and for the purpose of assisting your Trustee in the development and formulation of a plan of reorganization for the affairs of the debtor. Your Trustee would now respectfully represent unto the Court that it does not deem it necessary to so engage the services of the said Allen G. Messick.

Wherefore your petitioner prays that an order be entered by the Court countermanding the authority of your Trustee to employ the said Allen G. Messick as aforesaid.

Central Trust Company, Trustee. By A. A. Payne,  
Vice President and Trust Officer.

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed June 27, 1941

To The Honorable Judge Of The District Court Of The United States For The Southern District Of West Virginia:

The petition of the Banking Commission of the State of Wisconsin respectfully alleges:

1. That on June 6, 1941 the petition of Fidelity Assurance Association was filed herein praying that said debtor be reorganized under the provisions of Chapter 10 of the Bankruptcy Act.

2. That said Fidelity Assurance Association was licensed to do business in the State of Wisconsin as an "investment association" under the provisions of Chapter 216, Wisconsin Statutes, on June 26, 1930, and did business in the State of Wisconsin as such "investment association" from June 26, 1930 to approximately April 14, 1941.

3. That under the provisions of Chapter 216, Wisconsin Statutes, applicable to said Fidelity Assurance Association, it is provided that all of the provisions of Chapter 215, Wisconsin Statutes, with respect to the supervision, control and conditions upon which foreign building and loan associations are permitted to do business in the State of Wisconsin are applicable to and imposed upon said Fidelity Assurance Association, the same as though said Association was a foreign building and loan association authorized to do business in the State of Wisconsin, so far as such supervision, control and conditions can be made applicable to the particular business done by said Association.

4. That during the time when said Fidelity Assurance Association was licensed and doing business in the State of Wisconsin, said Association was, under the provisions of Chapter 215 and Chapter 216, Wisconsin Statutes, subject to the supervision and control of the Banking Commission of Wisconsin and has been licensed annually by said Commission.

5. That in order to do business in the State of Wisconsin, said Association was, under the provisions of Sections



215.38, 215.39 and 215.395, Wisconsin Statutes, compelled to have and keep on deposit with the State Treasurer of Wisconsin in trust for the benefit and security of Wisconsin contract, bond or certificate holders of said Association until all of said Association's contracts and obligations to persons residing in the State of Wisconsin shall have been fully performed and discharged, securities of certain nature and kind as specified in said statutes in an amount equal to at least one hundred ten (110%) per cent of the liability of said Association on contracts, bonds or certificates outstanding or contracted for by persons residing in the State of Wisconsin.

6. That in accordance with the requirements of said statutes, Fidelity Assurance Association deposited with the State Treasurer of Wisconsin securities having an approximate market value as of February 28, 1941 of \$2,606,883.16 with unpaid interest coupons appertaining thereto in a sum of approximately \$28,394.53 to secure its liabilities to Wisconsin residents as aforesaid.

7. That under the provisions of Chapter 215, Wisconsin Statutes, applicable to Fidelity Assurance Association, the [fol. 63] Banking Commission of Wisconsin is given the right and has the duty of taking possession of the business and property of said Association located in the State of Wisconsin whenever the Commission shall find that said Association is conducting its business in an unauthorized or unsafe manner, or is in an unsound or unsafe condition to transact its business, or has an impairment of its capital, or cannot with safety and expediency continue business, or has suspended payment of its obligations, and that the Banking Commission of Wisconsin, having on April 14, 1941 found that said conditions existed, the said Commission did, on April 14, 1941, acting pursuant to the provisions of Chapter 215, Wisconsin Statutes, appertaining thereto, take possession and control of all of the business and property of said Fidelity Assurance Association located in the State of Wisconsin, and by said action and by order of the Circuit Court for Dane County, Wisconsin entered April 14, 1941, the Banking Commission of Wisconsin was vested with the title to all of the Wisconsin assets and property of said Association including the aforementioned deposit.



8. That the Banking Commission of Wisconsin has, since April 14, 1941, acting by itself and through Howard L. Smith, Special Deputy Commissioner of Banking duly appointed to assist in the duty of liquidation and distribution of the Wisconsin assets of said Fidelity Assurance Association, and acting under orders of the Circuit Court for Dane County, Wisconsin, duly entered, proceeded to administer and liquidate the Wisconsin assets of said Fidelity Assurance Association for the benefit of contract, bond and certificate holders of said Association residing in the State of Wisconsin.

9. That, acting under orders of the Circuit Court for [fol. 64] Dane County, Wisconsin, the Banking Commission of Wisconsin has, in accordance with the statutes of Wisconsin in such case made and provided, proceeded to give notice to all Wisconsin residents holding contracts, bonds or certificates of said Fidelity Assurance Association to file their claims with the Banking Commission of Wisconsin, such notices having been given to approximately 6,200 residents of Wisconsin who are holders of contracts, bonds or certificates of said Fidelity Assurance Association, and that the greater portion of said Wisconsin contract holders have now filed their claims with the Banking Commission of Wisconsin in said proceeding.

10. That, as the Banking Commission of Wisconsin is informed and believes, said Fidelity Assurance Association was on June 6, 1941, at which time its petition herein was filed, and is presently, chartered as an insurance corporation under the laws of the State of West Virginia, the state where said Association is incorporated, and therefore is not a corporation which could be adjudged a bankrupt under the Bankruptcy Act and is not a corporation which could be reorganized under the provisions of Chapter 10 of the Bankruptcy Act, and by reason thereof, the court herein is wholly without jurisdiction in this matter.

11. That the petition filed by Fidelity Assurance Association was not filed in good faith within the meaning of Chapter 10 of the Bankruptcy Act in that it is unreasonable to expect that a plan of reorganization can be effected herein for the reason, among others, that prior proceedings are pending in a court of the State of Wisconsin, as hereinbefore set forth, and that the interests of Wisconsin creditors

of Fidelity Assurance Association herein should be dismissed.

[fol. 65] 12. That the Banking Commission of Wisconsin maintains that the deposit made with the State Treasurer of Wisconsin in trust for the benefit and security of all contract holders resident in Wisconsin may be administered and applied only for the benefit of such Wisconsin residents, and said deposit having been made under provisions of the Wisconsin Statutes adopted by the State of Wisconsin in the exercise of its sovereign power as a condition precedent upon which Fidelity Assurance Association was authorized to do business in the State of Wisconsin, and the statutes of the State of Wisconsin providing a complete scheme for the administration of such assets for the benefit of Wisconsin contract holders, the court herein is wholly without jurisdiction to take possession of or administer any of said assets so deposited in Wisconsin or to affect the rights of contract holders resident in Wisconsin in such deposited assets, and that any law purporting to give such jurisdiction to this court would be unconstitutional and void.

13. That, as the Banking Commission of Wisconsin is informed and believes, all of the assets of Fidelity Assurance Association are on deposit with state authorities either in the State of West Virginia, the place of incorporation of said Association, or in other states in which said Association does business, said Association having done business in approximately nineteen (19) states of the United States. That in a large number of such states, including the State of West Virginia, proceedings were, prior to the filing of the petition herein, commenced for the purpose of liquidating the funds so on deposit in such states for the benefit of contract holders, and that, as the Banking Commission of Wisconsin is informed and believes, the state authorities of a large number of said states other than the State of Wisconsin also will deny and contest the jurisdiction of the court herein on grounds similar to those urged herein or on other grounds, and that these circumstances further demonstrate that the petition herein is not, within the meaning of Chapter 10 of the Bankruptcy Act, filed in good faith in that if the petition herein is not dismissed, thousands of contract holders in the State of Wisconsin and elsewhere will have to await the payment of their just claims until such questions are determined in lengthy and costly litigation,

and that this fact conclusively demonstrates that the interests of the creditors of Fidelity Assurance Association would be best subserved in the prior proceedings already instituted in the State of Wisconsin and in various other states for the benefit of such contract holders.

14. That, as further bearing on the question of good faith herein, it is wholly unreasonable to expect that a plan of reorganization can be effected for the further reason that should the assets of Fidelity Assurance Association now on deposit with the State of Wisconsin and other states be turned over to a trustee appointed herein, said Association would at the instant such deposits were so turned over and removed from the possession and control of such state authorities, be without power to transact further business in such states and thus any attempt to reorganize such corporation by proceedings taken in derogation of state deposit laws must prove futile.

15. That the Banking Commission of Wisconsin, by reason of the facts and circumstances as heretofore alleged, has an interest in these proceedings and desires to intervene herein for the purpose of contesting the jurisdiction of the court upon the grounds as generally set forth herein or upon such other grounds as may be proper.

[fols. 67-68] Wherefore, the Banking Commission of Wisconsin prays that an order be entered giving said Commission leave to intervene in this proceeding for the purpose of moving to dismiss said petition, moving to vacate any orders heretofore entered affecting the interests of this petitioner or to file its answer controverting the facts alleged in said petition and setting up the grounds for the dismissal thereof, and that the court enter its further order designating that the Banking Commission of Wisconsin be given notice of all matters and proceedings herein.

Banking Commission of Wisconsin, by (S.) Frank H. Bixby, Commissioner; (S.) John E. Martin, Attorney General of the State of Wisconsin; (S.) Rickard H. Lauritzen, Assistant Attorney General, Attorneys for Banking Commission of Wisconsin.

Dated June 24th, 1941.

*Duly sworn to by Frank H. Bixby. Jurat omitted in printing.*

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION REQUESTING FURTHER INSTRUCTIONS OF THE COURT  
IN RESPECT TO THE OPERATION OF THE DEBTOR'S BUSINESS—  
Filed July 3, 1941

To the Honorable Ben Moore, Judge of the District Court of  
the United States for the Southern District of West Vir-  
ginia:

I

Your petitioner is the duly qualified and acting Trustee herein. By an order dated June 6, 1941, your petitioner was authorized, empowered and directed to conduct the business of the debtor herein. Your petitioner desires to submit to the court certain problems in the conduct of the business of the debtor herein which have arisen or which in the opinion of your petitioner are likely to arise, and as to which your petitioner prays the instructions of this Court.

II

The business of the debtor herein consists essentially of four phases: (1) Receipt of money from contract holders; (2) payment of money to contract holders; (3) making investments; and (4) liquidating investments. Each of these phases of the debtor's business involves questions of policy, which your petitioner feels are matters which should properly be decided by the Court after it has had the benefit of an expression of views thereon by the parties interested herein.

III

This proceeding supersedes a proceeding in the State Court of the State of West Virginia, in which H. Isaiah Smith and Ross B. Thomas were appointed Receivers of the assets and property of the debtor herein. Pursuant to the order of this Court said Receivers are turning over to your petitioner the assets of the debtor which they have reduced to possession. In said State Court proceeding an order was entered directing the said Receivers to accept payments from holders of contracts issued by the debtor herein, despite the pendency of said proceeding, but to hold such pay-  
[fol. 70] ments in trust for the benefit of the contract holders



making such payments, except to the extent that insurance premiums were paid to the Lincoln National Life Insurance Company on behalf of contract holders of Series B as to which paragraph 6 is applicable. The order of said Court authorized that such premiums so paid might be deducted from the amounts paid by such contract holders of the debtor herein and the balance of such payments be held in trust as aforesaid. By an order entered herein on June 14, 1941, your petitioner was directed to continue the procedure set forth in said prior order of the State Court. Your petitioner represents to the Court that under the order of June 14 aforesaid, payments received from contract holders may not be invested by your petitioner but must be held in trust by your petitioner for the persons making such payments and must be returned by your petitioner to said persons upon request. Accordingly, your petitioner is advising all contract holders of this arrangement in a notice dated July 3, 1941, a copy of which is annexed hereto and made a part hereof and marked "Exhibit A". The receipt of such payments by contract holders of the debtor herein involves substantial expense to the estate. The refunding of such payments involved additional expense to the estate. To the extent that the sums so paid by the debtor's contract holders are retained by your petitioner as Trustee herein, they result to no benefit to the estate by way of income or otherwise. Your petitioner submits, therefore, for the consideration of this Court and of the interested parties the question whether your petitioner should be required to continue to receive such payments from the contract holders of the debtor.

#### IV

A decision as to the question submitted in the foregoing paragraph involves a further question with relation to those contracts of the debtor which bear insurance features. Contracts known as Series B contain a paragraph numbered 6 which provides as follows:

"Section 6. Insurance Protection. If this Section 6 (and not Section 7) is made effective at issue, as set forth on the fact of this contract, the Association has arranged for Life Insurance under a group and/or individual legal reserve life insurance policy covering the original registered holder of this contract provided he be in good health



and has been accepted by the Insurance Company at the date of its issue.

“(Protection for Contract) Said policy provides that upon receipt of due proof of death of such registered holder occurring while said policy is in force and while insured thereunder, and subject to the terms, conditions and privileges set forth in said policy, the Insurance Company issuing [fol. 71] said policy will pay to the Association an amount required by the Association to declare this contract fully paid.

“(Fully Paid Contract) Upon receipt of due proof of the death of such registered holder on forms prescribed by the Association and of the money from the Insurance Company in accordance with the above, the Association will declare this contract fully paid, and upon presentation will make suitable endorsement thereon; provided that if said due proof of the death of such registered holder and/or the money from the Insurance Company shall be received by the Association later than one month after the last month for which monthly payments have been made, the Association will require an exchange of this contract for another of the same form and amount, and endorsed fully paid, but maturing later than this contract by a period equal to the months then elapsed after the month of last monthly payment made hereon.

“(No further Payments) In declaring a contract fully paid the Association waives the payment of all monthly payments that have not been made. The contract, when declared fully paid, may remain in effect to maturity, otherwise unchanged as to terms and privileges, except that it shall have increased cash availability.

“(Increased Cash Availability) The cash availability of a contract declared fully paid shall be as shown in a cash surrender schedule to be endorsed hereon, making available an amount equal to eighty-six monthly payments, at the end of the first month for monthly payments, and a progressively greater amount at the end of each later month, by one-third of one monthly payment, to the eighty-third month inclusive, and thereafter by two-fifths of one monthly payment to the one hundred eighth month inclusive, and thereafter by two-thirds of one monthly payment to the one hundred twenty-sixth month inclusive.

“(Conditions of Protection) The policy issued by the insurance company provides that the benefits thereunder will

not be available (a) if the original registered holder of this contract shall die while more than three months in arrears in any payment thereon, or (b) if such registered holder shall commit suicide while sane or insane within two years from the date of this contract, or (c) if such registered holder has made any material misrepresentation or false statement as a basis for obtaining the insurance protection provided in this Section, or (d) if such registered holder cease to be the registered holder of this contract.

“(Termination of Protection) In conformity with the terms of this contract and the policy issued by the insurance company, the insurance protection hereunder will terminate (a) at the expiration of three months from the due date of any monthly payment not duly paid within such period, or (b) upon the date of any transfer of this contract upon the books of the Association, or (c) if this contract be surrendered for a paid-up contract or for its cash value, or (d) if any indebtedness to the Association, and/or interest thereon, be not duly paid when due or within the grace period, if any, allowed for such payment, or (e) when all monthly payments required hereunder shall have been duly paid or this contract be declared fully paid. No paid up contract shall have insurance protection. If this contract be exchanged, without transfer, for a new contract of the same form and amount while the insurance protection remains in effect according to the terms of this Section 6, the insurance protection will be continued according to the terms of this contract.

“(Reinstatement of Protection) If insurance protection hereunder be terminated in any manner, before declaration that this contract is fully paid, or before all monthly payments hereon have been duly paid, and this contract be continued or replaced by reinstatement, reissue or transfer according to its terms, or otherwise, insurance protection may be obtained upon the life of the same or the substituted registered holder (as the case may be) only if accepted for such protection by the life insurance company after submission of evidence of insurability as required by said company, and only subject to the same conditions as for a newly issued contract. If this contract is at any time without insurance protection before declaration that this contract is fully paid, or before one hundred twenty monthly payments hereon have been duly paid, the provisions of Section 7 shall apply.

**“(Reserve Requirements) Upon declaring the contract fully paid, the Association shall set aside in the Maturity and Retirement Reserve Fund such amount, in addition to the required accumulation in the Reserve Fund for such contract as prescribed in Section 1 hereof, as is necessary to meet the liability for the increased cash availability of such fully paid contract and the waiver of monthly payments not already paid, and shall, upon the due dates of such subsequent monthly payments (no longer required) transfer from the Maturity and Retirement Reserve Fund to the Reserve Fund such amounts as would otherwise have been set aside in the Reserve Fund from such monthly payments.**

**“Section 6. Insurance Protection. (Continued.)**

**(General Terms) Nothing contained in this contract shall be deemed to be a representation or promise on the part of the said Insurance Company, or as placing the said Insurance Company under any accountability or responsibility whatsoever to such registered holder, but its entire responsibility shall be exclusively to the Association under the policy issued and is to be determined wholly in accordance with the terms and conditions of said policy. It shall be the duty of the Association to continue the said policy as long as necessary hereunder, but if said policy shall terminate for any reason whatsoever while such protection of such registered holder remains necessary hereunder, the Association will endeavor to replace such protection in a legal reserve life insurance company; and should for any reason beyond the control of the Association such replacement prove impracticable, the Association will so notify such registered holder. No suit for benefits under this Section 6 may be brought against the Association after one year from the death of such registered holder, unless by statute applicable to this contract a longer minimum period is prescribed, in which case such period shall apply hereunder.”**

Of the contracts of the debtor now in force, approximately fifteen thousand involve the operation of said paragraph 6 [fol. 73] and carry such insurance feature. In order to maintain said insurance in force it is, of course, necessary to make current payments of premiums thereon. The State Court, in the prior receivership proceeding, authorized, empowered and directed its Receivers to make such current premium payments out of sums received from the debtor's

contract holders. If the within proceeding should result in a liquidation or even in a substantial modification of the debtor's outstanding contracts, it may prove to have been detrimental to the holders of such contracts bearing insurance features to have continued making payments of premiums to maintain such insurance obligation in force. On the other hand, if the within proceeding should result in a reorganization which effects no substantial change in the debtor's existing contracts, serious detriment may result to the debtor's contract holders from a failure to maintain such insurance provisions in force. Accordingly, your petitioner has instituted negotiations with the Lincoln National Life Insurance Company, the obligor under said insurance contracts, with a view to effecting a moratorium of premium payments and benefit payments during the pendency of this proceeding, without, however, impairing the effectiveness and operation of the existing insurance contracts. If your petitioner should succeed in working out such a moratorium it will so advise your Court and ask for authority to enter into such arrangement and approval of the contract embodying such arrangement. However, if your petitioner should be unsuccessful in its attempts to negotiate such a moratorium, serious question will arise as to the desirability of continuing premium payments on behalf of holders of contracts of the debtor with insurance features. On this question also your petitioner seeks the advice and direction of the Court.

## V

Your petitioner is informed and believes that the extent and nature of the property and assets of the debtor herein, as well as the extent and nature of its liabilities, must be determined as of the date of the institution of the within proceeding, namely, June 6, 1941. If that is so, it follows that payments made by contract holders to your petitioner as Trustee subsequent to the institution of this proceeding do not become assets of the debtor for the purpose of this proceeding. It also follows that the liability of the debtor on its contracts cannot be increased or reduced by any action of the debtor, your petitioner, or the contract holders of the debtor which occurred subsequent to the filing of the [fol. 74] petition herein. Your petitioner therefore asks that pending the determination of the questions raised in this petition that this Court enter an order fixing the rights



of contract holders of the debtor as of the date of the institution of the within proceeding and preserving such rights regardless of the continuance of such contract holders to make payments to your petitioner or to the debtor herein in accordance with their respective contracts, except insofar as it shall be found necessary to continue paying premiums on insurance to maintain it in force, as discussed hereinabove. The order to be entered hereon will, of course, be subject to re-examination and revision as a result of the plenary hearing which is contemplated herein.

## VI

Certain of the contracts of the debtor herein have matured and been paid off in full. Others have matured and prior to the institution of this proceeding and the prior receivership proceeding were being paid off in monthly installments. Certain of the contracts of the debtor herein will mature during the pendency of this proceeding. All the contracts of the debtor herein have a specified cash surrender value. Demands have been made upon your petitioner for payments in accordance with one or more of such alternative obligations of the debtor. Your petitioner has consistently refused to make any payments to the debtor's contract holders out of funds of the debtor. The assets of the debtor include substantial sums of cash which are not needed in the administration of this proceeding. Your petitioner seeks the advice and instructions of this Court as to the extent to which it should make payments to holders of contracts of the debtor who desire such payments. In this connection your petitioner points out that each series of contracts issued by the debtor contemplates the segregation of certain assets to which the holders of contracts of such series may have recourse in satisfaction of their claim under such contracts. Moreover, substantial proportions of the debtor's assets have been deposited with official agencies of the various states in which the debtor was authorized to do business. Your petitioner is now engaged in seeking to reduce to possession assets of the debtor so deposited. Your petitioner also represents that holders of certain series of the debtor's contracts have received payments out of funds borrowed from assets of the debtor segregated for the benefit of the [fol. 75] debtor's contracts of other series. Your petitioner



will submit as soon as possible a detailed report as to the foregoing. It is mentioned in this petition insofar as it has bearing upon the question raised as to the extent to which your petitioner may make payments to holders of contracts of the various series issued by this debtor.

## VII

To the extent that the estate of the debtor herein consists of cash, your petitioner is uncertain as to its duty to invest said cash in income-producing securities. If it should make such investment your petitioner desires to be advised whether it is restricted to investments which are legal for trust funds in the State of West Virginia. The foregoing problem is rendered more acute to the extent that securities constituting assets of the debtor herein pay interest or dividends in the form of cash which comes into the possession of your petitioner and to the extent that securities constituting assets of the debtor herein are called and paid off in cash which comes into the possession of your petitioner as Trustee.

## VIII

In view of the fact that a substantial proportion of the assets of the debtor herein in the hands of your Trustee consists of securities having a readily ascertainable market value, your petitioner is faced with the problem whether it should reduce all such securities to cash or, in the alternative, whether it should reduce to cash only such securities as in the opinion of your petitioner represent sound investments, or whether some other test should be adopted by your petitioner. On all of these questions your petitioner seeks the advice and instructions of this Court.

## IX

Included in the assets of this estate are shares consisting of all the presently issued and outstanding stock of a corporation known as Fidel Association of New York, Incorporated. This corporation was incorporated under the laws of the State of New York. It is engaged in the sale of contracts similar to the contracts issued by the debtor herein and conducts all the activities of a corporation engaged in such business. The contracts so issued by said Fidel Association of New York, Incorporated, are guaranteed by

the debtor herein. Notice of the pendency of the within proceeding is being given to holders of contracts issued by said Fidel Association. Your petitioner is undecided, and [fol. 76] therefore seeks the advice and instructions of this Court, as to the following:

1. Should your petitioner displace the present officers and directors of Fidel Association of New York, Incorporated, with officers and directors chosen by your petitioner and answerable to your petitioner?

2. Should your petitioner file a petition against, or on behalf of said Fidel Association as a subsidiary of the debtor herein in this proceeding and subject said Fidel Association and its assets to the jurisdiction of this Court and the operation of this proceeding?

3. Arrangements were made by the Receivers appointed in the State Court receivership, which preceded the within proceeding, whereby the Colonial Trust Company of New York was appointed successor Trustee under the contracts issued by said Fidel Association in place of Charleston National Bank, Trustee. Said Receivers entered into an arrangement with said Colonial Trust Company, whereby the latter agreed that in the event any holder of a contract issued by the Fidel Association should desire to make a loan from the debtor herein pursuant to the terms of his contract that such loan would be made by said Colonial Trust Company in lieu of the debtor herein, said Trust Company taking as security therefor the reserve value behind the contract as to which the loan was made. Your petitioner has taken no steps to continue in force the said agreement between the prior Receivers and the Colonial Trust Company, and your petitioner seeks the advice and instructions of this Court as to whether it should enter into such an arrangement with said Colonial Trust Company or enter into any other arrangement designed to accomplish the same end, or to discharge in some other way the obligation of the debtor herein to make loans to the holders of contracts issued by said Fidel Association, or whether your petitioner should in no way seek to discharge the obligation of the debtor herein to make such loans as aforesaid.

Central Trust Company, Trustee, By A. A. Payne,  
Vice-President. Townsend and Townsend, At-  
torneys.

[fol. 77] *Duly sworn to by A. A. Payne. Jurat omitted in printing.*

[fols. 78-93] **EXHIBIT "A" TO PETITION**

**Central Trust Company, Trustee, for Fidelity Assurance Association, Wheeling, West Virginia.**

**To the Contract Owners and Creditors of Fidelity Assurance Association (formerly Fidelity Investment Association and Fidelity Investment and Loan Association):**

1. On June 6, 1941, Honorable Ben Moore, Judge of the District Court of the United States for the Southern District of West Virginia, approved a petition for reorganization filed by the Fidelity Assurance Association under Chapter X of the Federal Bankruptcy Act. The purpose of the proceeding is to effectuate a financial and structural reorganization of the company, which, according to the allegations of the petition, is unable to meet its debts as they mature.

2. The Central Trust Company, of Charleston, West Virginia, was appointed Trustee of the debtor (as the Fidelity is called in this proceeding.) It is now engaged in marshaling and conserving the assets of the debtor for the benefit of its creditors and contract holders with a view to formulating a plan of reorganization for the debtor and its property. To that end the Trustee is undertaking an investigation, among other things, of the debtor, the operation of its business and the desirability of the continuance thereof, a report of which investigation will be submitted to the Court and, in such form and manner as the Judge may direct, to the creditors, stockholders and Indenture Trustees, the Securities and Exchange Commission and such other persons as the Judge may designate. Suggestions for the formulation of a plan or proposals in the form of plans may be submitted to the Trustee on or before September 5, 1941, or such later time as the Judge may fix.

3. If it is found desirable to continue the business of the debtor, a plan or plans will be submitted to the Court. The Judge will submit to the Securities and Exchange Commission for examination and report the plan or plans which the Judge regards as worthy of consideration. Thereafter, any plan which, in the opinion of the Court, complies with

the provisions of the Federal Bankruptcy Act and which is fair and equitable and feasible, will be approved by the Judge and submitted to the creditors and stockholders affected thereby. If a plan is accepted in writing by creditors holding two-thirds in amount of the claims filed and allowed of each class, and, if the debtor has not been found to be insolvent, by or on behalf of stockholders holding the majority of stock, of which proofs have been filed and allowed of each class affected by the plan, the Judge, after hearing, may confirm such plan and declare it effective as to the debtor, its property, its creditors and stockholders and all other persons interested in or having claims against the debtor or its property.

4. It is the duty and desire of the Trustee to protect the interests of the contract holders and creditors and all other persons interested in or having claims against the debtor or its property, wherever located, and every effort will be made to effect a reorganization of the debtor, under the direction of the Federal Court. However, if it should prove impossible to consummate a fair and equitable and feasible plan of reorganization in the manner above described, the Court will either dismiss the proceedings or direct a liquidation of the debtor and its assets. In the latter event, the property of the debtor, which is almost entirely in the form of liquid assets composed of stocks, bonds and other forms of securities, will be sold and the proceeds paid to the creditors and contract holders of the debtor. If all claims against the debtor should be paid in full, any balance remaining would be distributed to the stockholders of the debtor.

5. Prior to the institution of this proceeding, the Circuit Court of Kanawha County, West Virginia, appointed Receivers for the debtor in a proceeding instituted in that Court on April 11, 1941. The Receivers appointed under that proceeding, Ross B. Thomas and H. Isaiah Smith, of Charleston, West Virginia, have been ordered to surrender and deliver all of the assets in their possession to the Trustee herein. They are currently complying with said Order.

6. Under the Circuit Court proceeding, which is now superseded by this one, the contract holders were informed that monthly payments on their contracts made by them




during the receivership would be held intact by the Receivers and in case of ultimate liquidation would be returned to them in full, but without interest, except that in the case of Series B contracts in which paragraph 6, providing life insurance, was effective, such payments would be returned, less deductions made for payment of the insurance premiums. In the present proceedings in the Federal Court, the Court has entered an order to the same effect, i. e., the Trustee is required to segregate payments made after the State Court receivership and payments made pending the present Federal proceeding, and hold the same in trust to be returned to the contract holders upon request.

7. If payments made after the beginning of the State Court proceeding (April, 11) are permitted to remain with the Trustee, the Trustee will, by order of the Federal Court entered June 14, keep segregated such payments, and in case of ultimate liquidation such payments will be returned to the persons making them, intact but without interest and less deductions made for life insurance premiums, as provided in Series B contracts in which paragraph 6 is effective.

8. Any contract holder desiring to receive back payments made after the beginning of the State Court proceedings may do so by filling out and mailing the enclosed application. No money can be returned to contract holders at this time which was paid in before April 4, 1941, the date upon which payments were first segregated and impounded under an order of the Insurance Commissioner of West Virginia. Contract holders will be either paid as creditors of the debtor in case of ultimate liquidation, or allowed to participate in a plan of reorganization of which they will be later notified. Loans on contracts cannot be made at this time, nor can cash surrender values be obtained.

9. To enter into correspondence with individual contract holders and creditors would involve a large expense to the trust, and would serve no very good purpose. You will be kept informed of your rights and of developments regarding a plan of reorganization.

Very truly yours, Central Trust Company, Trustee.  
July 3, 1941.





[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed July 28, 1941

To the Honorable Ben Moore, Judge of the District Court  
of the United States for the Southern District of West  
Virginia:

Now comes the Banking Commission of Wisconsin by  
John E. Martin, Attorney General of the State of Wisconsin,  
and Rickard H. Lauritzen, Assistant Attorney General of  
the State of Wisconsin, said Banking Commission of Wis-  
consin having been permitted to intervene in this proceed-  
ing by order of the court herein, dated June 27, 1941, and  
for its answer to the petition of the debtor filed herein on  
June 6, 1941, alleges as follows:

#### First Defense

1. Answering paragraph I of debtor's petition, the Bank-  
ing Commission of Wisconsin admits on information and  
belief that the debtor Fidelity Assurance Association was  
on June 6, 1941, when said petition was filed, a corporation  
duly organized and existing under the laws of the state  
of West Virginia; denies that said debtor had its prin-  
cipal assets within the southern district of West Virginia  
for a longer portion of the six months immediately preced-  
ing the filing of said petition than in any other judicial dis-  
trict; denies that said debtor on the date of said petition  
[fol. 95] owned assets of the value of \$13,000,000.00, which it  
alleges in said petition were on the date of said petition sit-  
uated in the city of Charlestown, West Virginia for more  
than six months immediately preceding the filing of said  
petition; denies that the Banking Commission of Wisconsin  
has information sufficient to form a belief that said debtor  
was incorporated under the laws of the state of West Vir-  
ginia on the 26th day of April, 1911, as Fidelity Investment  
Loan Association and that its name was thereafter changed  
to Fidelity Investment Association, and that on or about  
December 31, 1940, its name was again changed to Fidelity  
Assurance Association, as alleged in said debtor's petition,  
and leaves the debtor to its proof thereon. Further answer-  
ing paragraph I of debtor's petition, the Banking Commis-

sion of Wisconsin alleges that said debtor on the date of said petition was in a state of dissolution in the state of West Virginia, the original domicile of said corporation, and was and is presently without license to do business of any nature whatever in the state of West Virginia; that said debtor was on the date of filing said petition and is presently without license to do business of any nature in the state of Wisconsin, and that the Banking Commission of Wisconsin is informed and believes that said debtor was on the date of said petition and is presently without license to do business of any nature in any state whatever, and that said debtor was, prior to the filing of said petition, divested of substantially all its assets, its corporate charter, and its licenses and franchises to carry on the business which it had previously carried on, in any state whatsoever; and that said debtor does not exist as a corporation which may file a petition under Ch. X of the Bankruptcy Act.

[fol. 96] 2. Answering paragraph II of debtor's petition, the Banking Commission of Wisconsin denies that said debtor was on the date of said petition or is presently a corporation, as defined in the said Bankruptcy Act, which could be adjudged a bankrupt under said Act, and denies the allegations of said debtor in said petition that debtor is not an insurance corporation and alleges that if debtor had any corporate existence whatever on the date of filing of said petition such existence was as an insurance corporation chartered under the incorporation laws of the state of West Virginia as such and licensed under the insurance laws of the state of West Virginia as such, and that said debtor was therefore not authorized to file a *p-tition* under the provisions of Ch. X of the Bankruptcy Act. Further answering paragraph II of debtor's petition, the Banking Commission of Wisconsin alleges that said debtor was, in a number of the states in which it did business, licensed as an insurance company, in a number of other states was licensed as a building and loan association and was in the state of Wisconsin subject to statutory supervision and control in the same manner as a foreign building and loan association, and that by reason of the charter of said debtor, the nature of its business, and the nature of the licensing and control of said debtor in the states in which it operated, said debtor is entirely without the scope of the bankruptcy laws of the

United States, and without the scope of Ch. X of the Bankruptcy Act.

3. Answering paragraph III of debtor's petition, the Banking Commission of Wisconsin admits the allegation therein contained that said debtor at the time of filing said petition was not licensed to sell investment or annuity contracts, and alleges that said debtor was, on the last date [fol. 97] prior to the filing of said petition, when it had any corporate existence, powers or license, licensed in the state of West Virginia, the state of its domicile, as a life insurance company, and as to each of the other allegations contained in said paragraph III of debtor's petition the Banking Commission of Wisconsin alleges that it does not have information sufficient to form a belief and leaves debtor to its proof thereon.

4. Answering paragraph IV of debtor's petition, the Banking Commission of Wisconsin alleges that it does not have information sufficient to form a belief as to the allegations therein contained and leaves debtor to its proof thereon.

5. Answering paragraph V of debtor's petition, the Banking Commission of Wisconsin alleges that as to the debtor having in existence and outstanding investment and annuity contracts having a total reserve liability of approximately \$25,685,999.79 it does not have information sufficient to form a belief and leaves debtor to its proof thereon; denies that the debtor is the owner of assets of the value of approximately \$23,000,000.00, approximately \$13,000,000.00 of which are situate in the city of Charleston, West Virginia, and alleges that debtor, prior to the filing of said petition, had been divested by reason of the operation of state laws in the states in which debtor operated of substantially all its assets; denies that it has sufficient information to form a belief as to the allegations therein contained that the schedule attached to said petition, marked "Exhibit A", contains a full and true statement of all the assets and liabilities of said debtor, and as to the facts relative to said assets and liabilities leaves debtor to its proof thereon.

[fol. 98] 6. Answering paragraph VI of debtor's petition, the Banking Commission of Wisconsin admits the allega-

tions therein contained relative to the appointment of receivers for the property and assets of said debtor by the Circuit Court of Kanawha County, West Virginia, at the suit of Edgar B. Simms, Auditor of the State of West Virginia and ex officio Insurance Commissioner of the State of West Virginia, but denies that it has sufficient information to form a belief as to the present qualification and status of the receivers appointed by said state court, and leaves debtor to its proof thereon; further answering said paragraph VI of the debtor's petition the Banking Commission of Wisconsin denies that it has information sufficient to form a belief as to the allegations set forth in said paragraph relative to the appointment of independent receivers in the states of Indiana, Ohio, Illinois, Tennessee, Kentucky, Pennsylvania and other states, either as to the nature of said proceedings, the amount of assets involved in said proceedings, or the present status of said proceedings, and leaves debtor to its proof thereon; further answering said paragraph, the Banking Commission of Wisconsin alleges that on the 14th day of April, 1941, it took possession and control of the business and property of said debtor located in the state of Wisconsin and that on said date title to all of the assets, business and property of said debtor, located in the state of Wisconsin, was vested in the Banking Commission of Wisconsin, and that the Banking Commission of Wisconsin, from April 14, 1941 to June 6, 1941, at which latter date the petition of the debtor was filed, has proceeded to administer the assets of said debtor [fol. 99] located in the state of Wisconsin and to liquidate the same for the benefit of contract holders of said debtor residing in the state of Wisconsin, pursuant to the statutes of the state of Wisconsin in such cases made and provided.

7. Answering paragraph VII of debtor's petition, the Banking Commission of Wisconsin admits that debtor had outstanding certain investment and annuity contracts, but as to the allegation that the reserve liabilities totalled approximately \$25,000,000.00, denies that it has information sufficient to form a belief and leaves debtor to its proof thereon; admits that in these contracts the debtor agreed to pay certain interest accumulations, but denies that it has information sufficient to form a belief as to the amount of said interest accumulations and leaves debtor to its



proof thereon; denies that it has information sufficient to form a belief as to whether the decrease in interest rates in recent years has made it impossible for debtor to invest its funds in conformance with the West Virginia law and to earn the interest requirements as set forth in its said outstanding contracts, and leaves debtor to its proof thereon; admits that prior to the time of the filing of said petition the debtor was suffering an annual loss and that this loss will continue and increase; but denies that it has information sufficient to form a belief as to the precise amount of annual loss or whether such loss could be avoided by an increase in earnings of the securities of the debtor, and leaves debtor to its proof thereon; admits that the debtor has been and will be unable to meet its obligations as they mature, but as to whether the reasons for its inability to meet said obligations are the reasons set forth by debtor in said paragraph VII the Banking Commission of Wisconsin [fol. 100] denies that it has information sufficient to form a belief and leaves debtor to its proof thereon and alleges that such inability to meet its obligations in a large measure resulted from mismanagement and dissipation of its assets on the part of said debtor and its stockholders, officers and directors and its failure to comply with state laws designed to safeguard the interests of the purchasers of said debtor's contracts; denies that if the rights of the outstanding contract holders of debtor are modified as alleged in said petition the debtor will be able to meet its reserve requirements and will be able to comply with the Investment Company Act of 1940 and will be able to resume the operation of its business, and specifically alleges that in the state of Wisconsin said debtor would not under such circumstances be enabled to resume its business, and that said debtor has lost its license to do business in the state of Wisconsin and that said debtor will be wholly unable to modify the contracts of said debtor held by residents of the state of Wisconsin, said contract holders being entitled to look to the deposits made by said debtor in the state of Wisconsin in accordance with Wisconsin law for the payment of the amounts due on said contracts without modification thereof and further alleges on information and belief that the debtor will for similar reasons be wholly unable to resume business in any state whatsoever at any time; admits that each of the outstanding contracts of debtor is secured by certain funds on deposit with the Treasurer of the state of



West Virginia and with the officials and departments of other states where the securities of debtor were sold, but as to the nature of said funds and the security afforded thereby, except as regards the state of Wisconsin, alleges that it does not have information sufficient to form a belief and leaves debtor to its proof thereon; admits that debtor [fol. 101] could obtain no relief in this proceeding unless the rights of all contract holders were modified, but specifically denies the right of debtor or any other person or agency to modify said contracts including those held by residents of Wisconsin, and denies that debtor is entitled to any relief under Ch. X of the Bankruptcy Act and as to whether debtor by reason of the facts alleged in paragraph VII of said petition could not obtain adequate relief under Ch. XI of the Bankruptcy Act; alleges that it does not have information sufficient to form a belief and leaves debtor to its proof thereon..

8. Answering paragraph VIII of debtor's petition, the Banking Commission of Wisconsin admits on information and belief that no plan of reorganization has yet been formulated, but as to debtor's knowledge of any plan of reorganization, readjustment or liquidation affecting the property of the corporation pending either in connection with or without any judicial proceeding except receiverships created in West Virginia and other states, some of which are threatening to sell the assets now in their possession as alleged in said petition, the Banking Commission of Wisconsin denies that it has information sufficient to form a belief and leaves debtor to its proof thereon.

9. Answering paragraph IX of debtor's petition, the Banking Commission of Wisconsin denies that the debtor is a corporation which might lawfully form a desire to effect a plan of reorganization under Ch. X of the Bankruptcy Act, and therefore denies the same.

[fol. 102] 10. Answering paragraph X of debtor's petition, the Banking Commission of Wisconsin denies that it has information sufficient to form a belief as to the allegations therein contained and leaves debtor to its proof thereon, and specifically denies that any action on the part of the Board of Directors of debtors, or any other corporate action on the part of said debtor, could lawfully authorize the filing of a petition by said debtor under Ch. X of the Bankruptcy Act.

## Second Defense

Further answering the petition of the debtor herein, and in addition to its admissions and denials of the allegations thereof as aforesaid, the Banking Commission of Wisconsin alleges:

1. That said debtor's petition filed June 6, 1941, was not filed in good faith as required by Ch. X of the Bankruptcy Act in that among other things it is wholly unreasonable to expect that a plan of reorganization can be effected herein and in that prior proceedings are pending in the courts of the state of Wisconsin and in the courts of other states in which proceedings the interests of Wisconsin creditors and creditors resident in other states would be best subserved.

2. That the stockholders of debtor have no equity or interest whatever remaining in the business, property or assets of said debtor, the contract holders of said debtor constituting the only remaining interest in the business, property and assets of said debtor, and said stockholders have no legitimate interest whatever to be served by [fol. 103] the maintenance of this proceeding and that the maintenance of this proceeding can result only to the detriment of the contract holders of debtor located in Wisconsin and elsewhere.

3. That the contract holders of said debtor located in Wisconsin are presently protected to the full extent of the value of the contracts held by them by funds deposited in Wisconsin by said debtor, title to which funds is now in the Banking Commission of Wisconsin and which funds are ready for distribution to said Wisconsin contract holders.

4. That, as the Banking Commission of Wisconsin is informed and believes, funds are also on deposit and held for distribution to contract holders in the state of West of West Virginia, and in other states, which will be readily available to all of said contract holders and no possible interest of said contract holders can be served by the continuance of this proceeding.

5. That the petition herein was filed at the instance of persons who are in the position of mere adventurers and who have no interest whatever in the business, property or assets of said debtor and the filing of said petition consti-

tutes an attempt to harass, hinder and delay the efforts of contract holders to realize the value of their contracts according to their rights under laws expressly adapted to such purpose, is in derogation of the very laws under which debtor operated and obtained its business and revenues during its business career, and is a gross misuse and perversion of the jurisdiction granted to the courts by Ch. X of the Bankruptcy Act.

6. That the filing of the debtor's petition has necessarily resulted in a contest as to the jurisdiction of the court herein, which contest was inevitable by reason of the duties [fol. 104] of the Banking Commission of Wisconsin and other state authorities to safeguard the interests of contract holders resident in Wisconsin and other states under state laws, and that the continuance of these proceedings in view of such contest will necessarily result in long and costly litigation and thousands of contract holders in the state of Wisconsin and elsewhere will have to await the payment of their just claims pending the outcome of such litigation and the outcome of these proceedings, by reason of which the contract holders located in Wisconsin and elsewhere will suffer irreparable loss, all of which was well known to the debtor at the time of filing said petition.

7. That to the knowledge of the Banking Commission of Wisconsin the contract holders of said debtor resident in Wisconsin are desirous that the funds deposited by debtor in Wisconsin in trust for the benefit and security of Wisconsin contract holders should be liquidated and paid out and that a large number of contract holders have urgently requested that these funds be so paid out to them, and, in view of the history of said debtor in Wisconsin and its failure to meet its obligations, said contract holders are no longer willing to carry their contracts with said debtor either as presently constituted or upon any proposed reorganization, and the Banking Commission of Wisconsin is informed and verily believes that said contract holders will not consent to any plan of reorganization whatever involving said debtor. That the Banking Commission of Wisconsin is informed and believes that a similar situation exists with respect to contract holders of debtor residing in other states, and that for such reasons it would be wholly impossible to effect a plan of reorganization herein.

[fol. 105] 8. That an examination of the terms of the various contracts which debtor has outstanding which include provisions relative to cash value, paid up contract value, options, reserve funds, maturity and retirement funds, surplus participation, cash commuted value, insurance protection features, and many other diverse and complex provisions illustrates that insurmountable difficulties would be presented in attempting to modify all of the various classes of contracts outstanding and to secure the consent of the requisite number of contract holders thereof, and demonstrates conclusively that a reorganization of the debtor is not feasible.

9. That although all of the facts alleged in this answer were well known to the debtor at the time said petition was filed and said debtor has for a period of some years been well aware that it would be unable to meet its contract obligations, yet said debtor has wholly failed to file or suggest any plan of reorganization up to the present time and has given no indication whatever as to when such a plan may be forthcoming, and that the failure of debtor in this respect under the circumstances existent demonstrates conclusively its lack of good faith in the filing of said petition.

Wherefore, the Banking Commission of Wisconsin prays that the petition of said debtor be dismissed.

Banking Commission of Wisconsin, by Robert K. Henry, Commissioner; John E. Martin, Attorney General, State of Wisconsin; Richard H. Lauritzen, Assistant Attorney General, State of Wisconsin, Attorneys for the Banking Commission of Wisconsin.

Dated this 25th day of July, 1941.

[fol. 106] *Duly sworn to by Robert K. Henry. Jurat omitted in printing.*

[fol. 107] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER—August 1, 1941

This day came the Central Trust Company, Trustee herein, and filed its petition, requesting that its authority

heretofore granted herein by order of June 7, 1941, authorizing the said Trustee to employ one James R. Fleming, Attorney at Law, for special services during the period of the administration of this trust, be countermanded.

And the Court having examined the said petition and being fully advised in the premises now grants the prayer of said petition and hereby revokes and countermands the authority heretofore granted the Trustee to employ the said James R. Fleming for the performance of such special services as required by the Trustee in the administration of this trust.

Dated this 1st day of August, 1941.

Ben Moore, U. S. D. J.

(The Petition, referred to in the foregoing order, is in the words and figures as follows):

[fols. 108-110] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AUTHORITY TO DISPENSE WITH SERVICES OF  
JAMES R. FLEMING—Filed August 1, 1941

To the Honorable Ben Moore, Judge of Said Court:

Now comes the Central Trust Company, Trustee herein, and respectfully shows the Court that under an order heretofore entered herein on June 7, 1941, your Trustee was authorized and empowered by the Court, pursuant to Section 157 of Chapter 10 of the Federal Bankruptcy Act, to employ one James R. Fleming, Attorney at Law, for special services for the purpose of assisting your Trustee in marshalling the assets of the debtor and for the purpose of assisting your Trustee in the development and formulation of a plan of reorganization for the affairs of the debtor. Your Trustee would now respectfully represent unto the Court that it does not deem it necessary to so engage the services of the said James R. Fleming.

Wherefore, your petitioner prays that an order be entered by the Court countermanding the authority of your Trustee to employ the said James R. Fleming as aforesaid.

Central Trust Company, Trustee, by A. A. Payne,  
Vice President and Trust Officer.



[fol. 111] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER AND CONTROVERSION OF EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST VIRGINIA, AND EX-OFFICIO INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA—Filed August 4, 1941

*To the Honorable Ben Moore, Judge of the District Court of the United States, for the Southern District of West Virginia:*

The respondent, Edgar B. Sims, who is the duly elected, qualified and acting Auditor of the State of West Virginia, and ex-officio is the Insurance Commissioner of the State of West Virginia, and who was given leave to intervene in this cause and file such answers or other pertinent or necessary pleadings as he might deem appropriate by order entered in this cause on the 13th day of June, 1941, for answer to the petition of the debtor filed herein, says:

[fol. 112]

I

Respondent admits that the debtor, Fidelity Assurance Association, is a corporation duly organized and existing under the laws of the State of West Virginia, but denies that it has had its principal assets within the Southern District of West Virginia for a longer portion of the six months immediately preceding the filing of the petition than in any other Judicial District, and denies that its principal assets of the value of approximately \$13,000,000.00 were situate in the City of Charleston, West Virginia, in said Southern District, for more than six months immediately preceding the filing of the petition. Respondent avers that the assets referred to in the debtor's petition as being the principal assets of the debtor and as having a value of approximately \$13,000,000.00, consist of securities deposited by the debtor with the State of West Virginia in accordance with the provisions of Chapter 33, Article 9, Section 3 and Chapter 12, Article 5, as amended, of the Code of West Virginia; that the term, "principal assets," as used in Section 128 of the Bankruptcy Act, means assets which are capable of being taken into possession by the Trustee appointed for the debtor and susceptible of administration by said

Trustee; that said principal assets referred to are not capable of being taken into possession by said Trustee nor susceptible of administration by it, and, therefore, are not "principal assets" located in the Southern District of West Virginia for the purposes of the Bankruptcy Act. Respondent avers that the debtor has no other assets of substantial value located in the above named Judicial District. Respondent avers that the principal place of business of the debtor and the place where it has had its principal assets for the sixth month preceding the filing of the petition is in the City of Wheeling, West Virginia, in the Northern District of West Virginia.

[fol. 113] Respondent admits that the debtor was incorporated under the laws of the State of West Virginia on the 26th day of April, 1911, as Fidelity Loan Association, that its name was thereafter changed to Fidelity Investment Association, and that on or about December 31, 1940, its corporate name was again changed to Fidelity Assurance Association.

## II

Respondent admits that the debtor is a corporation which could be adjudged a bankrupt under the Federal Bankruptcy Act, and is not a municipal insurance or banking corporation, or building and loan association, and is not a railroad corporation authorized to file a petition under the provisions of the Bankruptcy Act.

## III

Respondent admits all of the allegations of Paragraph III of the petition, except such portion thereof as infers that the Investment Company Act of 1940 made it impossible for the debtor to comply with the provisions of said Act by reason of having "increased the reserve requirements on the part of debtor to contractholders," but avers that the debtor could not comply with the provisions of Section 28 of said Act, requiring any registered face amount certificate company, before it could issue or sell any face amount certificates or collect or accept any payment on any such certificate issued by such company on and after January 1, 1941, to have outstanding a capital stock worth on a fair valuation of assets, not less than \$50,000.00, and to maintain at all times minimum certificate reserves on all its outstanding face amount cer-

tificates in an aggregate amount calculated to be sufficient in amount, as and when accumulated, at a rate *not* to exceed three and one-half percentum per annum, compounded annually, to provide the minimum maturity or [fol. 114] face amount of the certificate when due, and avers that there were other requirements of the said Investment Company Act of 1940 which debtor could not and cannot comply with.

#### IV

Respondent admits all of the allegations of Paragraph IV of the petition stating the capitalization of the debtor, but denies any inference which may be drawn therefrom to the effect that said capital constitutes any fund or security in the commonly accepted sense of a capital account, or that it is represented by any assets in any way equivalent to the total par amount of said stock available as a capital fund after payment of all claims of creditors, but avers that the payment of all claims of the creditors would entirely wipe out said capital account and the assets carried on the books of the debtor to maintain the same.

#### V

Respondent denies that the debtor has in existence outstanding investment and annuity contracts having a total reserve liability of approximately \$25,685,999.79, that it is the owner of assets of the value of approximately \$23,000,000.00, of which \$13,000,000.00 thereof is situate in the City of Charleston in the Southern District of West Virginia; and denies that the schedule filed with the petition as Exhibit A contains a full and true statement of all the assets and liabilities of the debtor as of the date of the filing of the petition, but avers that as of April 11, 1941, the total reserve liability and the cash liability of all debtor's outstanding investment and annuity contracts were \$26,932,488.31 and \$26,186,505.62, respectively. Respondent further avers that among other failures, such schedule does not reflect as a fixed liability an indebtedness [fol. 115] of \$750,000.00 owed by the debtor as endorser on a note of National Sales Agency, Inc., held by three of the debtor's sponsored contract reserve funds, nor does it disclose that any claim against said National Sales Agency, Inc., on said note is utterly worthless.

## VI

Respondent admits that on April 11, 1941, he filed his petition in Chancery in the Circuit Court of Kanawha County, West Virginia, asking, among other things, for the appointment of a Receiver or Receivers for the property and assets of the debtor, but avers that under the statutes of the State of West Virginia in such cases made and provided, he, as Auditor and ex-officio Insurance Commissioner of the State of West Virginia, has the same authority over the debtor as over an insurance company, and under the facts and circumstances disclosed in his bill, he was required, with the aid and upon filing of a bill in said Court, to administer the assets of said debtor as an insolvent, and to take possession of its property in the State of West Virginia and distribute its assets among those entitled thereto according to their respective rights, and that in performing the duties imposed upon him by statute with respect to said debtor, he had the right to the aid, counsel, advice and instructions of said Court; that in addition to asking for the appointment of a Receiver or Receivers for the property and assets of the debtor, he asked for the administration of the assets of said debtor as an insolvent, the taking of possession of such property of said debtor in said State and the distribution of its assets among those entitled thereto or the rehabilitation and reorganization of said debtor, and asked for the entry of the proper orders and decrees necessary or needful to aid, guide and instruct him in the performance of the various duties imposed upon him by the statutes of the State of [fol. 116] West Virginia, particularly Chapter 33, Article 9, Section 10, of the Code of West Virginia, relating to control and disposal of securities deposited by the debtor with the State of West Virginia in trust for the benefit of its contractholders.

Respondent admits that said Court in said proceedings appointed H. Isaiah Smith and Ross B. Thomas as Receivers for the assets of the property of the debtor, but denies that said Receivers were appointed Receivers for all of the property and assets of the debtor situate in the State of West Virginia in so far as the same would be inclusive of the securities of the debtor deposited as aforesaid with the State of West Virginia, and denies that said



Receivers are Receivers for, or have taken into their possession, such securities deposited with the State of West Virginia.

Respondent admits that Receivers were appointed in the States of Indiana, Ohio, Illinois, Wisconsin, Tennessee, Kentucky and Pennsylvania, and various other states, for the assets and property of the debtor situate in those states, and that said Receivers have taken charge and are holding such assets so situate in each of the said respective states, but denies that the value of the assets and property of the debtor situate in said states has the approximate value of \$10,000,000.00.

## VII

Respondent admits that the debtor has outstanding investment and annuity contracts with certain reserve liabilities, but denies that the total amount thereof is approximately \$25,000,000.00, but avers and charges that said reserve liability on April 11, 1941, was \$26,932,488.31. Respondent admits that debtor agreed to pay the interest accumulations or improvements specified in debtor's petition; that the decrease in interest rates in recent years [fol. 117] obtainable from securities acceptable for deposit under West Virginia Law has been insufficient to earn the interest requirements required by its outstanding contracts, and that by said deficiency in earnings of interest, the debtor is now suffering an annual loss of approximately \$250,000.00, and that said loss will continue and probably increase unless the earnings on sound securities should substantially increase over the present rate of interest.

Respondent admits that the debtor was unable to meet its obligations as they matured, but denies that debtor will be able to meet its obligations as they mature if "the rights of its contractholders are modified so that the earnings received on securities and assets owned by debtor will be sufficient in amount to meet the requirements under its outstanding contracts"; and denies that "if the rights of its outstanding contractholders are modified to this extent, debtor will be able to meet its reserve requirements and will be able to comply with the Investment Company Act of 1940, and will be enabled to resume the operation of its business." Respondent charges that the debtor's license from the State of West Virginia to engage in the



business of issuing and selling investment or annuity contracts has expired and has not been renewed; that before debtor could resume the operation of its business it would have to obtain new licenses from the State of West Virginia and from the various other states in which it operates; that the financial condition of the debtor was such that the respondent as Insurance Commissioner was required to administer the affairs of the debtor as an insolvent, and the statutes of the State of West Virginia in such cases made and provided require respondent to keep the deposit made with the State of West Virginia under his authority and control until the total liability of all [fol. 118] the contracts, certificates or annuity bonds or contracts issued by the debtor in this state is redeemed or settled. Respondent charges that there can be no resumption of the operation of the business by the debtor until the Insurance Commissioner of the State of West Virginia has issued it a license to do business in accordance with the statute and until the total liability of all such contracts issued by the debtor in this State is redeemed or settled.

### VIII

Respondent has no knowledge of whether any plan of reorganization of the debtor was being formulated other than to the extent that a plan was in process of being formulated by the Receivers appointed by the Circuit Court of Kanawha County, which plan would have involved in all cases voluntary action on the part of each of the contractholders of the debtor with respect to any adjustment or modification of their individual rights and privileges.

### IX

Respondent denies that it is the desire of the debtor that a plan of reorganization be effected under the provisions of Chapter X of the Bankruptcy Act, and that a Trustee be appointed for the purpose of formulating and presenting a plan of reorganization for debtor under the provisions of said chapter, but charges, on information and belief, that debtor filed its petition for the express and primary purpose of attempting to oust him, as Insurance Commissioner of the State of West Virginia, of the jurisdiction over the debtor and its administration

as an insolvent given him by the statutes of the State of West Virginia in such cases made and provided. Respondent avers that the capital accounts of the debtor are impaired many times the total amount thereof; that it had been his unyielding decision and policy to formulate no plan of rehabilitation or reorganization, nor recognize [fol. 119] nor approve any plan of reorganization or rehabilitation submitted by others which in any way would recognize, treat with or give effect to any pretended equity remaining in the capital accounts for the stockholders of the debtor, a policy which he had many times unequivocally stated, and which was well known to all of the members of the Board of Directors who caused this proceeding to be instituted. Respondent charges that with their intimate knowledge of debtor's financial condition, such directors must be presumed to have known that no plan of reorganization of the debtor could be effected under Chapter X of the Bankruptcy Act which would give any recognition to their position as stockholders of the debtor, and, therefore, further charges that this proceeding was instituted in bad faith by such members of the Board of Directors of the debtor for the purpose of ousting the jurisdiction of respondent and the State Court Receivers, through liquidation in a bankruptcy proceeding, but inasmuch as a bankruptcy court, under Chapters I to VIII of the Bankruptcy Act, would have no jurisdiction over the assets of the debtor deposited with various state authorities, a voluntary petition in bankruptcy would be ineffective to accomplish their purpose without there first having been instituted an intermediate proceeding under Chapter X of the Bankruptcy Act, whereby the debtor and its directors hoped to be able to vest in a trustee in reorganization proceedings possession and title to such deposited securities, to be later transferred to a trustee in bankruptcy when it would become evident that no plan of reorganization under Chapter X could be feasible or adopted or confirmed by the court, necessitating a dismissal of proceedings or a transfer to bankruptcy.

## X

Respondent admits that certain individuals purporting to be directors of the debtor congregated in the City of Pitts- [fol. 120] burgh, Pennsylvania, on the 3rd day of June,

1941, and held what was purported to be a special meeting of the Board of Directors of the debtor, but respondent denies that a special meeting of the Board of Directors of the debtor was legally and validly held on the 3rd day of June, 1941, or that a copy of said resolution filed with debtor's petition as Exhibit B is a copy of a resolution duly adopted by a meeting of the Board of Directors of said debtor duly called, convened and held, for the reasons hereinafter more fully set forth in the controversion portion of this answer.

As to all of the allegations of the debtor's petition hereinbefore denied, this respondent demands strict proof.

And Now, having fully answered the petition of the debtor filed in this cause, the respondent, by way of controversion to said answer, would show the following:

## XI

Respondent avers that the petition in this cause was neither properly and legally filed, nor was it filed in good faith because it was not validly and legally authorized by a proper and legal meeting of the Board of Directors of the debtor, and in support thereof says:

1. The purported meeting of the Board of Directors of the debtor, held on the 3rd day of June, 1941, was held in the City of Pittsburgh, Pennsylvania, pursuant to notice sent to all of the directors. The by-laws of the debtor do not provide any place for the holding of regular or special meetings of the Board of Directors, nor to this respondent's knowledge had the Board of Directors by resolution provided the City of Pittsburgh as a place where regular or special meetings of the Board of Directors could be held. Respondent charges that in the absence of provisions of the [fbl. 121] by-laws or resolution of the Board of Directors fixing a place for the holding of meetings of the Board of Directors, such meetings must be held at the principal office of the corporation, which, in the case of the debtor, is in the City of Wheeling, West Virginia, and this respondent, therefore, avers that any meeting purporting to be a meeting of the Board of Directors of the debtor held on the 3rd day of June, 1941, in the City of Pittsburgh, Pennsylvania, was invalid as such and all action taken thereat null and void and of no legal effect whatever.

2. The by-laws of the debtor in effect on June 3, 1941, provided that the number of directors should consist of not more than fourteen (14) stockholders, any seven (7) of whom should constitute a quorum. At the last previous annual meeting of the stockholders of the debtor, held on February 21, 1941, fourteen (14) stockholders were elected to the Board of Directors, of whom four, namely, Arthur B. Koontz, Wheeler C. Bachman, Walter T. Grosseup and Tom B. Foulk, had either refused to serve as such or had resigned prior to the purported meeting held June 3, 1941, and two directors so elected, namely, Edwin R. Palmer and S. J. Gilfillan, had not qualified or indicated whether they would accept the directorship to which they were elected, thus leaving the Board constituted on June 3, 1941, at eight members. On information and belief, at the purported meeting held on said date, there were present the following persons, who had been elected directors of the debtor: John Marshall, Sr., John Marshall, Jr., A. L. King, F. H. Pulfer, H. E. Reed and A. G. Messick, six in number. There were absent: F. S. Risley and C. E. Smith. The six persons present did not constitute a quorum of the Board of Directors for the transaction of business as provided by the by-laws, such number required being seven, and respondent avers on information and belief that in order to provide a quorum for the adoption of the resolution [fol. 122] authorizing the institution of this proceeding, one James R. Fleming of Ft. Wayne, Indiana, who was not a stockholder of the debtor or a director thereof, but who was nevertheless present at said meeting, and who is the same James R. Fleming who filed the debtor's petition in this cause as counsel, suggested that the secretary of the corporation, F. J. McNulty, who was present at the meeting, become and be elected a member of said Board of Directors, but Mr. McNulty declined so to serve; that thereupon the said James R. Fleming stated in effect that he deemed it preferable for him (James R. Fleming), in the light of future matters, not to become a member of said Board or serve thereon, but that as an emergency confronted them, and to make a quorum, he would consent to become a member of the Board of Directors at the meeting thereof held at Pittsburgh on June 3, 1941, and would resign at the close of the meeting; that thereupon the said James R. Fleming was elected by the six



directors in attendance at said meeting to be a member of the Board of Directors for the purpose of providing a quorum for the transaction of the business which was to come before the meeting, namely, the authorization of the filing of the petition in this proceeding, and that after the adoption of the resolution filed as Exhibit B to the debtor's petition, and as the last item of business of said special meeting, the said James R. Fleming resigned as director. The by-laws provide that the number of directors shall consist of not more than fourteen *stockholders*, and neither at the time of his election as director, nor during his service in such capacity, nor at any time subsequent thereto, was the said James R. Fleming the holder of any shares of stock of the debtor, and was ineligible in any case to be elected as a member of the Board of Directors. Respondent charges that as a matter of law the election of the said James R. Fleming as a member of the Board of Directors of the debtor was a nullity not [fol. 123] only for the reason that he was ineligible by reason of not being a stockholder of the debtor, but particularly because the circumstances of his election, namely, the expressed reluctance to serve except as an emergency measure for the accomplishment of a single specified purpose, coupled with his intention of resigning at the close of the meeting, which was expressed prior to his election, and as a condition thereof, and his service solely in connection with the authorization of the institution of this proceeding, which he later was to institute as counsel, rendered his election a fraud in law. Respondent, therefore, charges that the election of said James R. Fleming as a director was a nullity, and that at no time at said meeting of June 8, 1941, was a quorum, as provided by the by-laws of the debtor, present and acting.

3. Section 9A of the Investment Company Act of 1940 makes ineligible certain persons to serve as an officer or director of a registered investment company by declaring that it shall be unlawful for any person to serve or act in the capacity of director who, by reason of any misconduct, is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction from acting as an underwriter, broker, dealer or investment adviser, or as an affiliated person, salesman or employee of any investment company, bank or insurance



company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purpose or sale of any security. In December, 1938, the Securities and Exchange Commission filed a civil action against the debtor in the United States District Court for the Eastern District of Michigan, Southern Division, in which it sought an injunction against the violation of Section 17 of the Securities Act of 1933 (15 U. S. C. 77 Q). The defendant filed an answer which substantially admitted the basic facts alleged in the complaint, but denied the legal effect sought to be drawn there-[fol. 124] from by the Commission. Without going to trial on the issues, the debtor consented to the entry of a final judgment, admitting the jurisdiction of the court for the purposes of the actions, but without admitting the allegations of the complaint, and denying past derelictions. The final judgment, without containing any finding that any particular acts or practices were fraudulent, nor enjoining any particular conduct as such, enjoins the defendant (debtor herein) its officers, directors, agents, employees and representatives in the sale of its contracts by use of any means or instruments of transportation or communication in interstate commerce, or by use of the mails, directly or indirectly, from doing certain acts and things and engaging in certain activities.

All of the directors present at the meeting in Pittsburgh on June 3, 1941, with the exception of A. G. Messick, were officers or directors, or both, of the debtor at the time of the entry of the aforesaid final judgment, and as such had been enjoined from engaging in or continuing certain conduct or practice in connection with the sale of the debtor's contracts. Such directors, who were so ineligible in January or February of this year, filed with the Securities and Exchange Commission applications for exemption from ineligibility imposed by Section 9A of the Investment Company Act of 1940, and this respondent, on information and belief, avers that thereafter the Securities and Exchange Commission granted temporary exemption upon such application, but almost immediately thereafter and prior to June 3, 1941, revoked such temporary exemption, and, therefore, this respondent charges that all of the directors purporting to act at said meeting of June 3, 1941, with the exception of A. G.

Messick, were ineligible to serve as directors of the debtor under the provisions of Section 9A of the Investment Company Act of 1940, to which the debtor, its officers and directors are subject, and that by reason thereof all action [fol. 125] taken and resolutions adopted at said purported meeting are null and void and of no legal effect whatever.

## XII

Respondent charges that the petition filed by the debtor herein was not filed in good faith as required by Section 141 of the Bankruptcy Act, and in the nature of specifications therefor says:

1. The petition was not filed in good faith by reason of the circumstances alleged in Paragraph IX of this answer, relating to the purpose for which this respondent charges the petition was filed.

2. The petition was not filed in good faith by reason of the circumstances set forth in Paragraph XI of this answer, and particularly in subparagraph (2) thereof, the latter relating to the manner and circumstances surrounding the election of James R. Fleming to the Board of Directors of the debtor, his action taken as such director, and his subsequent resignation at the close of the meeting in which he was elected, all taken immediately prior to and in contemplation of the filing of the petition.

3. The petition was not filed in good faith because it alleges a desire not only to effect a reorganization (denied by this respondent), but on its face, discloses a desire to effect such reorganization in such a manner as would be of benefit to the stockholders and directors of the debtor at the expense of its contractholders or creditors when it was well known to the directors authorizing the filing of the petition that there was no equity remaining for the stockholders which could lawfully be treated with in any reorganization under the provisions of Chapter X of the Bankruptcy Act. Specifically, the debtor's petition states in Paragraph IX thereof that it is the desire of the debtor that a plan of reorganization be effected under the provisions of Chapter X of the Bankruptcy Act, and that a trustee be appointed to formulate and present such plan of reorganization while in Paragraph

VII of its petition the debtor states that it will be unable to meet its obligations as they mature "unless the rights of its contractholders are modified so that the earnings received on securities and assets owned by debtor will be sufficient in amount to meet the requirements under its outstanding contracts; and if the rights of its outstanding contractholders are modified to this extent, debtor will be able to meet its reserve requirements and will be able to comply with the Investment Company Act of 1940, and will be enabled to resume the operation of its business." Respondent charges that it is apparent from the foregoing allegations of the debtor's petition that if indeed it seeks any reorganization, which is denied by this respondent, it seeks a reorganization whereby the interests of the stockholders will be preserved or benefited, and whereby it will be enabled to resume the operation of its business for the benefit of its stockholders and under their continued ownership, at the expense of the contractholders or creditors by modifying the rights of said contractholders (so that the earnings received on securities and assets owned by debtor will be sufficient in amount to meet the requirements under its outstanding contracts."

4. This respondent is advised that it is proper in determining the good faith and proper motives or absence thereof in connection with the filing of a petition such as the debtor has filed herein to look to the acts of the persons instigating the proceedings taken at and immediately before and after the filing of the petition. Respondent avers that the Chairman of the Board of Directors of the debtor was and is A. G. Messick of Chicago, Illinois; that said Messick is not and never was the holder of any sub-[fol. 127] stantial amount of stock of the debtor; that said Messick became involved in the affairs of the debtor in the early part of the year 1940 under a contract whereby it was contemplated that a new corporation would be formed to take over the assets, liabilities and business of the debtor; that Messick and associates would provide the new corporation with a paid-in capital of at least one-half million dollars, for which they would receive eighty per cent of the stock and the balance, or twenty per cent thereof, would be distributed to the then stockholders of the debtor; that said contract was in effect a plan of recapitalization of the debtor; and was dependent for its consummation upon a number of

conditions safeguarding Messick and his associates; that pending the consummation of the plan, and during the period when a majority of the stock of the debtor had become vested in John Marshall, Sr., Trustee, pursuant to said agreement, said Messick was elected a director and eventually Chairman of the Board of Directors of the debtor; that after said plan of recapitalization had failed of consummation, and he had not provided the half million dollars of capital or any sum of money for the debtor, and no longer had any proper interest in its affairs, he continued to hold such offices and to exercise control and dominance over the debtor, although this respondent, as Insurance Commissioner of the State of West Virginia, did then and on several occasions thereafter demand his (Messick's) resignation and removal and the severance of all of his connections with debtor. This respondent charges on information and belief that the James R. Fleming, heretofore mentioned in this answer, had long been a close associate of the said A. G. Messick. This respondent further charges on information and belief that at the instigation of said A. G. Messick, and with the aid of James R. Fleming, the Board of Directors held a purported meeting thereof on the 3rd day of June, 1941, and authorized the filing of the debtor's petition; that in [fol. 128] the afternoon of June 6, 1941, the debtor's petition was filed in this Court, and that upon the filing thereof the Court entered an order approving the petition and appointing Central Trust Company of Charleston, West Virginia, Trustee for the debtor. On the following morning, June 7, 1941, said Trustee qualified as such by accepting the trust and giving bond. Immediately thereafter, on the same morning it selected and recommended its general counsel to aid and assist it in the administration of the trust, to which this respondent has no objection, but charges that at the same time it filed a petition in this cause for authority to employ the said James R. Fleming and A. G. Messick "for the purpose of assisting your Trustee in marshaling the assets of said debtor which are now situate in divers states outside the territorial limits of the State of West Virginia, and also for the purpose of assisting the Trustee in the development and formation of a plan of reorganization for the affairs of debtor in this proceeding \* \* \* and that this



authority is requested under Section 157 of Chapter X of the Federal Bankruptcy Act." Whereupon, the Court entered an order authorizing the employment of James R. Fleming and A. G. Messick as requested.

This respondent charges that under Section 157 of the Bankruptcy Act, an attorney appointed to represent a Trustee shall be a disinterested person except that for any specified purposes *other than to represent a Trustee in conducting the proceeding* under Chapter X, the Trustee may, with the approval of the Judge, employ an attorney who is not disinterested. Section 157 of the Bankruptcy Act declares that a person shall not be deemed disinterested if he is or was within two years prior to the date of the filing of the petition a director or an attorney for the debtor, or for any reason has an interest materially adverse to the interest of any class of creditors or stockholders. This respondent charges that the [fol. 129] purposes for which the said James R. Fleming and A. G. Messick were employed, as disclosed by the petition of the Trustee, were clearly matters in aid of the Trustee in conducting the proceeding, especially in so far as their services would be used in the preparation and formulation of a plan of reorganization, a duty exclusively imposed upon a disinterested trustee, and instead of being authorized by Section 157 of the Bankruptcy Act was specifically prohibited by Section 157 of the Bankruptcy Act.

This respondent charges that regardless of the propriety of the employment of said James R. Fleming and A. G. Messick to assist the Trustee, their projection of themselves into this proceeding, as special counsel or employees to assist the Trustee in matters peculiarly and strictly within the proceeding, on the day after the filing of the petition and coincident with the qualification of the Trustee and the giving of its bond, is a badge of bad faith upon the part of said Fleming and Messick, and, therefore, upon the part of the debtor, apparent on the record of this proceeding.

### XIII

The respondent charges that the petition was not filed in good faith within the provisions of Section 146(3) of the Bankruptcy Act in that it is unreasonable to expect that a plan of reorganization can be effected.

This respondent avers that suited as the provisions of Chapter X of the Bankruptcy Act may be when applied to the reorganization of ordinary business corporations, its provisions do not meet the needs of the debtor nor lend themselves to a ready application to the facts and principles involved in connection with any reorganization of the debtor. The respondent charges that the debtor is liable to contractholders residing in every state of the [fol. 130] United States and in some foreign countries; that in twenty of said states the debtor was required to obtain a license from a specified state authority, usually the Insurance Commissioner, the Banking Commissioner or the Securities Commissioner; that in fifteen of said states the debtor was required, or has in the past been required, to maintain deposits with specified state authorities of securities for the protection of resident contractholders within the state. The respondent charges that in each of the fifteen states in which the debtor has deposits, the same are held in trust or under a lien for the benefit of resident contractholders. Respondent avers that at the outset there are thus fifteen classes of creditors, differing in the amount of securities pledged for the benefit of their respective classes, and differing in the percentage of coverage afforded by said deposited securities to the total liability within the state.

Respondent further avers that the debtor has issued seven separate and distinct series of contracts, each providing that there shall be segregated and held in trust for the benefit of all the contractholders of that series, securities of the kind prescribed by the laws of the State of West Virginia, and further avers that in the case of three of said series of contracts debtor is, by the terms of said contract, required to set up and maintain a separate and distinct fund for such number of contracts within that series as have matured under the terms thereof, such reserve funds being known as Maturity and Retirement Funds; and that there are, therefore, a total of ten contract reserve funds, required by the terms of the contract to be maintained separate and distinct from each other. Respondent avers that the debtor has not made deposits of securities in the various states in a manner so that the contract liability upon each series of contracts would correspond to the contract fund securities deposited, but on the other hand has deposited any available [fol. 131] securities irrespective of the contract fund

to which they belong against liabilities of contracts of other series; that typical of this practice is the situation prevailing in the State of Virginia where contract fund securities of only one fund are deposited against contract liabilities of eight funds, in the State of Ohio where contract fund securities belonging to two funds are deposited against contract liabilities of nine funds, and in the State of Wisconsin where contract fund securities belonging to four funds are deposited against contract liabilities of nine funds. The respondent says that the following tabulation shows the condition of contract fund deposits as against appropriate contract fund liabilities prevailing in the fifteen states requiring deposits to be made by the debtor. In such tabulation the states are listed vertically, the contract funds horizontally, and in the space at the intersection of the various horizontal and vertical columns the symbol "L" indicates contract liability to contractholders residing in such state, and the symbol "D" indicates that securities belonging to the pertinent contract fund have been deposited in such state. The tabulation does not attempt to show the excess in some states nor the deficiency in other states of the deposits with respect to contract liability:

[fol. 132]

	Spec. Income	Spec. Ann'ty	Spec. Ann.M&R	Series A	Series AM&R	Series B	Series BM&R	Series C	Series D	Series DM&R
Alabama.....	L	D	L	L	D	L	L		L	L
Delaware.....	L	L	L	L	D	L	L		L	
Illinois.....	L	L	L	L	D	L	L	D	L	
Indiana.....	L	L	L	L	D	L	L		L	
Iowa.....	L	L	L	L		L	L		L	
Kansas.....		L	L	L		L	L		L	
Kentucky.....	L	L	L	L		L	L		L	D
Maryland.....	L	L	L	L	D	L	L		L	
Missouri.....	L	D	L	L	D	L	L		L	
Ohio.....	L	L	L	L		L	L		L	D
Penna.....	L	L	L	L		L	L	D	L	
Tennessee.....	L	L	L	L		L	L	D	L	
Virginia.....	L	L	L	L	D	L	L		L	
West Va.....	L	D	L	L	D	L	L		L	D
Wisconsin.....	L	L	L	L	L	L	L	L	L	

Undeposited

Securities.....	Yes	Yes	No	Yes	No	Yes	Yes
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[fol. 133] This respondent is advised that the several series of contracts constitute separate and distinct classes in each state in which any deposit is required, and that it will be apparent from the foregoing tabulation that there are, therefore, a total of one hundred seventeen classes of creditors of the debtor if classified in accordance with the provisions of the Bankruptcy Act and decisions made with respect thereto. The respondent charges that it is unreasonable to expect that a plan of reorganization could be consummated which would require the consent, or treatment not necessitating the consent, of one hundred seventeen different classes of creditors.

This respondent further charges that the deposited securities in the hands of the various state officials, while subject in a limited way to the jurisdiction of the reorganization court, are not susceptible of being taken into possession and administered by the Trustee inasmuch as in most cases any order interfering with the possession of such state officials would be violative of the Eleventh Amendment of the Constitution of the United States, and that, therefore, the Bankruptcy Court cannot exercise adequate jurisdiction and control over the property and assets of the debtor to effect a plan of reorganization.

Respondent further avers that the debtor is a quasi-public utility, subject to regulation and visitation by various state authorities; that in the proper exercise of the police power, various states have imposed conditions to its doing business and requiring it to obtain licenses therefor, and that before the debtor could resume its business as a going concern and engage in the type of business in which it has heretofore conducted, it would have to obtain the requisite licenses from the proper state authorities, which this respondent avers will not be forthcoming to the debtor if it is reorganized in the face of such opposition by state [fol. 134] authorities as has already developed in this proceeding and in nullification of their respective state laws.

Respondent further avers that it is unreasonable to expect a plan of reorganization to be consummated for the reason that the type of business heretofore conducted by the debtor meets no real need in the economic structure of the country or its citizens; that there is no demand and has been no demand on the part of investors for the type of investment contract which the debtor has in the past sold, but that on the other hand such contracts have been sold through

concentrated sales effort, with the large, unreasonable and uneconomic expense thereof being paid for by the investors to whom such contracts were sold; that in the case of more than half of the contracts sold on the installment plan the purchasers have in the past permitted their contracts to lapse after making a number of payments sufficient in some cases to reimburse the debtor for the cost of selling expense as well as some profit thereon, but insufficient to yield to the holders of said contracts under the terms thereof any cash surrender or loan value. This respondent avers that the debtor has not been able in the past, nor would it be able in the future, under any plan of reorganization such as is proposed in the petition, to realize any profit from the earnings of securities purchased with the proceeds of sale of investment contracts over and above the required improvements thereon for the payment of operating expenses and a reasonable return upon any invested capital, or from any other source except from payments inuring to its benefit on lapsed contracts. This respondent avers that in the proceedings pending in the Circuit Court of Kanawha County, West Virginia, and in a statement made to the contractholders at the time of filing of his bill therein, he was of the opinion that any reorganization or re-[fol. 135] habilitation of the debtor should provide for a cessation of the type of business in which it had theretofore been engaged and recommended that after such assets of the debtor had been conserved and its affairs reorganized, that it engage in the business of life insurance.

#### XIV

The respondent charges that the petition was not filed in good faith within the provisions of Section 146 (4) of the Bankruptcy Act in that prior proceedings are pending in state courts and the interest of creditors would be best subserved in such prior proceedings. Respondent avers that the various states in which the debtor has engaged in business provide complete and adequate means of liquidation of insolvent companies such as the debtor, by courts of competent jurisdiction, and that upon a dismissal of the proceedings herein, if no reorganization could be effected, the state courts could liquidate the assets of the debtor within their respective jurisdictions and distribute the same among those creditors entitled thereto without the

necessity of incurring the unnecessary expense and delay of a multiplicity of plenary suits, which the Trustee or debtor will be forced to bring in order to obtain possession of the assets of the debtor, with no assurance that such suits will be successful.

## XV

This respondent is advised that the reorganization court, being a court of equity, should exercise its discretion, upon application of proper state officers, to relinquish its jurisdiction in favor of the officers designated by state statute for the administration of the assets of corporations under their jurisdiction, where the procedure provided by the statute is adequate and complete and accomplishes the [fol. 136] same end in substantially the same manner as would be reached in the reorganization court; and is further advised that the reorganization court as a court of equity should refuse to exercise its jurisdiction where its exercise would be prejudicial to the public interest, and it reasonably appears that the private right will not suffer; and this respondent is further advised that a reorganization court being a court of equity should exercise its discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy, so as to avoid any unnecessary interference by injunction with the lawful action of state officers.

Respondent charges that the procedure provided by the statute of the State of West Virginia is adequate and complete for the purpose of liquidating the affairs of the debtor in the event reorganization thereof cannot be effected, and that in such event the proceedings herein should be dismissed and the property and assets in the hands of the Trustee returned to the State Court Receivers.

[fol. 137] Wherefore, this respondent prays:

1. That the petition filed herein may be dismissed as not having been filed in the proper Judicial District.
2. That the petition filed herein may be dismissed as not having been filed pursuant to proper corporate action taken by debtor.
3. That the petition herein be dismissed as not having been filed in good faith, either in fact or in law.
4. That the Court will exercise its discretion and relinquish jurisdiction of the debtor in favor of this respondent.

ent, and the Receivers therefor appointed by the Circuit Court of Kanawha County, West Virginia, as well as in favor of the various other state officials having jurisdiction of the debtor in other states and the Receivers appointed in such other states.

(S.) Edgar B. Sims, Auditor of the State of West Virginia and ex-officio Insurance Commissioner of the State of West Virginia.

(S.) Clarence W. Meadows, Attorney General of the State of West Virginia. (S.) Ira J. Partlow, Assistant Attorney General.

[fol. 138] *Duly sworn to by Edgar B. Sims. Jurat omitted in printing.*

[fol. 139] IN THE UNITED DISTRICT COURT

[Title omitted]

ANSWER AND CONTROVERSION OF H. ISAIAH SMITH AND ROSS B. THOMAS, RECEIVERS OF THE DEBTOR, APPOINTED BY THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA—  
Filed August 4, 1941

To the Honorable Ben Moore, Judge of the District Court of the United States, for the Southern District of West Virginia:

These intervenors, H. Isaiah Smith and Ross B. Thomas, Receivers of Fidelity Assurance Association, appointed by the Circuit Court of Kanawha County, West Virginia, given leave to intervene in this cause and file such answers or other pertinent or necessary pleadings as they might deem appropriate by order entered in this cause on the 12th day of June, 1941, for answer to the petition of the debtor filed herein say:

# I

These intervenors have read the answer and controversion of Edgar B. Sims, Auditor of the State of West Virginia and ex-officio Insurance Commissioner of the State of West Virginia, filed or to be filed in this cause, and adopt said answer and controversion as their own with the same force and effect as if the same were set forth in full herein.



## II

These intervenors further aver that they have complied with the orders of the Court entered in this cause on the 6th day of June, 1941, and on the 10th day of June, 1941, requiring them to turn over to Central Trust Company, Trustee, all of the assets of the debtor in their possession, but further aver that they obeyed said order for the reason that they did not wish to be compelled to take the risk of being held in contempt of Court for failure to obey the same, and did so after their motion for a stay of said order of June 6, 1941, was denied, said turn-over being made under written protests delivered to the Trustee at the time or times said assets were delivered to the Trustee, said protest in respect of all of the assets of the debtor in their possession except certain segregated funds subject to order entered herein on the 14th day of June, 1941, together with the acceptance thereof, being as follows:

"To Central Trust Company, Trustee for Fidelity Assurance Association, Charleston, West Virginia.

[fol. 140] *Protest and Objection of Receivers*

H. Isaiah Smith and Ross B. Thomas, Receivers of Fidelity Assurance Association, by virtue of an order of the Circuit Court of Kanawha County, West Virginia, entered on the 11th day of April, 1941, and acting as Receivers since said date under the direction of said Court, and by reason of said Receivers having been served with a copy of an order entered by the U. S. District Court for the Southern District of West Virginia on June 6, 1941, requiring them to turn over all property and assets of the Fidelity Assurance Association in their possession or under their control to Central Trust Company, Trustee in Bankruptcy appointed in said Order of June 6, 1941, by said U. S. District Court, and further ordering and requiring them to refrain from any further acts or action with respect to their said appointment as Receivers do hereby, over their objections and protest obey said order, nevertheless stating and believing said Order not to be a valid one, but to be void and of no legal effect, and further stating that they obey said Order only and for no other reason than that they be not compelled to take the risk of being held to be in contempt of said U. S. District Court for failure to obey its order; nevertheless reserving unto themselves as Receivers all of

their legal rights and privileges, including the right to test the legality and validity of said Order of June 6, 1941, the jurisdiction of said U. S. District Court in entering said order and in all other matters arising by virtue of the institution of the proceedings in which said order was entered.

H. Isaiah Smith and Ross B. Thomas, Receivers for Fidelity Assurance Association, by (Signed) H. Isaiah Smith.

Wheeling, West Virginia.

June 10, 1941.

Received original of this paper this 10th day of June, 1941, at 4:03 P. M.

Central Trust Company, by (Signed) R. E. Plott, Treasurer."

and said protest in respect of the turn over of said segregated funds being as follows:

"Charleston, West Virginia,  
June 24, 1941.

Central Trust Company,  
Charleston, West Virginia.

GENTLEMEN:

"I am this day signing and delivering to you drafts covering the transfer to you as Trustee of the segregated funds held by the Receivers of Fidelity Assurance Association, which are the subject of an order of the United States District Court entered in proceedings for reorganization of said corporation on June 14th, 1941.

As stated to your counsel, Mr. Hillis Townsend, these funds are being delivered to you subject to the same protest as that made in connection with the delivery to you of other [fol. 141] assets of Fidelity Assurance Association in our possession.

Very truly yours, H. Isaiah Smith and Ross B. Thomas, Receivers, by (Signed) Ross B. Thomas."

RBT:ML.

### III

These intervenors further aver that as alleged in Paragraph VI of the said answer of Edgar B. Sims, Auditor, etc., the said Edgar B. Sims, Auditor, etc., filed a bill in the

Circuit Court of Kanawha County for the administration of the assets of the debtor as an insolvent, and that under the laws of the State of West Virginia in such cases made and provided the Insurance Commissioner of the State of West Virginia, whenever any company under his supervision and regulation shall become insolvent or be in such financial condition as not to be able to pay its creditors in this state, may file a bill in the Circuit Court of Kanawha County for the administering of the assets of such company as an insolvent and for the purpose of taking possession of its property in this state and the distribution of its assets among those entitled thereto according to their respective right. These intervenors aver that under the laws of the State of West Virginia the Insurance Commissioner in such suit was himself entitled to possession of all of the property of the debtor in the State of West Virginia but for the purpose of facilitating the marshaling of all of the assets of the debtor not deposited with the State of West Virginia pursuant to its statutes, and the administration thereof, he requested and caused these Receivers therefor to be appointed by the Circuit Court; and these intervening Receivers allege and aver that under the circumstances of their appointment and under the laws of the State of West Virginia applicable thereto they are in fact the agents of the Insurance Commissioner of the State of West Virginia, appointed for the purpose of taking possession of certain of the property of the debtor and administering it in conjunction with and under the supervision of the Insurance Commissioner of the State of West Virginia, subject to the proper orders of the Circuit Court of Kanawha County, West Virginia, and further allege that under the provisions of Chapter 33, Article 2, Section 36, it is provided that all [fol. 142] accounts rendered to any court by the Receiver of any insolvent insurance company of the State of West Virginia shall be presented by such receiver to the Insurance Commissioner for his examination, and the Commissioner shall report thereon to the Court to which said accounts are rendered before the same shall be accepted by said Court, and that receivers of insurance companies shall report to the Insurance Commissioner annually, or oftener in case he shall so direct, in such forms as he shall prescribe. These intervenors aver that by the provisions of Chapter 33, Article 9, Section 10, the Insurance Commissioner is given the same authority over the debtor as

he has over insurance companies. These intervenors are advised that under the circumstances of their appointment and under the laws of the State of West Virginia, that in their capacity as Receivers of the debtor they are agents of the Insurance Commissioner and are entitled to and clothed with the same immunities as are given the Auditor of the State of West Virginia, ex-officio Insurance Commissioner of the State of West Virginia, as an officer of the State of West Virginia.

Wherefore, these intervenors pray:

1. That the petition filed herein may be dismissed as not having been filed in the proper Judicial District.

2. That the petition filed herein may be dismissed as not having been filed pursuant to proper corporate action taken by debtor.

3. That the petition herein be dismissed as not having been filed in good faith, either in fact or in law.

4. That the Court will exercise its discretion and relinquish jurisdiction of the debtor in favor of the Insurance Commissioner of the State of West Virginia and the undersigned Receivers therefor appointed by the Circuit Court of Kanawha County, West Virginia.

5. That the orders entered in this cause on the 6th day of June, 1941, and on the 10th day of June, 1941, requiring said Receivers to turn over to the Trustee for the debtor all of the assets and property of the debtor in their possession be vacated, and that the Trustee be ordered to relinquish possession of and turn over to these intervening Receivers the property and assets of the debtor taken from them pursuant to the aforesaid orders, and that the Court will enter such other and further orders as may be necessary [fols. 143-154] to restore such possession to said Receivers.

H. Isaiah Smith and Ross B. Thomas, Receivers of Fidelity Assurance Association, appointed by the Circuit Court of Kanawha County, West Virginia.

Koontz & Koontz, Counsel for Receivers.

Ross B. Thomas and J. Campbell Palmer III, 501 Union Bldg., Charleston, W. Va.

H. I. Smith and Ross B. Thomas. Jurat omitted in printing.



[fol. 155] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING TRUSTEE'S REPORT, ETC.

This day came the Central Trust Company, Trustee herein, and presented and asked leave to file its Trustee's Report No. 2, together with its exhibits, marked for identification Exhibits A, B, C, D, E, F, G, H, J, K, L, and M; and the Court having examined the said report and exhibits, and the same appearing in all respects proper, the said report is hereby ordered filed.

And it appearing to the Court that numerous ones of the exhibits filed with said report are of a voluminous nature, and it further appearing that two copies of each of said exhibits could not conveniently be made and filed as required by the order entered herein on June 13, 1941, it is hereby ordered that copies of the said exhibits need not be filed.

Ben Moore, U. S. D. J.

August 5, 1941.

(The Trustee's Report, referred to in the foregoing order, is in the words and figures as follows:)

[fol. 156] IN UNITED STATES DISTRICT COURT

[Title omitted]

TRUSTEE'S REPORT No. 2—Filed August 5, 1941

To the Honorable Ben Moore, Judge of Said Court:

The Central Trust Company, heretofore appointed Trustee in the above cause, respectfully reports unto Your Honor as follows:

1. That in the operation of the debtor's business said Trustee has received cash and disbursed cash as shown by an itemized statement thereof filed as a part of this report and marked for identification "Trustee's Cash Receipts and Disbursements", "Exhibit A".
2. That in compliance with orders of Your Honor heretofore made and entered herein, the Trustee has notified the

custodians of the assets of the debtor of its appointment as Trustee and has demanded delivery of the same to your Trustee, all as more particularly shown by form copies of letters addressed to the various custodians, as set out in a list of the same filed with and made a part of this report and marked for identification "Trustee's Notice to Custodians of Debtor's Assets", "Exhibit B".

3. Your Trustee further respectfully reports that the assets of the debtor held by the various custodians as shown by the books and records of said debtor, but not verified by your Trustee with said custodians, are particularly described in a detailed list thereof filed with and made a part of this report, entitled "Fidelity Assurance Association Schedule of Security Deposits by States, April 10, 1941, Adjusted to June 6, 1941", and marked for identification "Exhibit C".

4. Your Trustee further reports unto Your Honor that although demand has been made on each of said custodians or security holder of the debtor's assets, as particularly set out in "Exhibit B" aforesaid, it has not received any of the said securities except those described in the list filed herewith and made a part of this report, which said list is entitled "Securities Delivered to Trustee" and marked for identification "Exhibit D."

5. Your Trustee further reports that there are now outstanding certain unpaid bills which were incurred prior to [fol. 157] the State Court receivership and during the administration of the State Court Receivers from April 11 to June 6, 1941, which bills were incurred principally in the operation of the home office and branch offices of the debtor. Your Trustee makes no report as to the validity of the claims which might be presented by the creditors indicated by this list. Your Trustee submits said list with and as a part of this report, said list being marked for identification as "Exhibit E."

6. Your Trustee further reports that immediately prior to the appointment of the State Court Receivers on April 11, 1941, there had been issued by the debtor numerous checks payable from the various funds of the debtor, which checks had not been paid by the respective banks upon which they were drawn at the time of the appointment of the State Court Receivers. Your Trustee reports that these

checks are still outstanding and unpaid and that a list thereof is filed herewith as a part of this report entitled "Outstanding Checks" and marked for identification "Exhibit F".

7. Your Trustee further reports that there are outstanding as of June 6, 1941, 8123 shares of common stock of the debtor; that said common stock is owned by approximately 400 stockholders; and that there is filed herewith and made a part of this report a list showing the name of each stockholder and his or her post office address or place of business, marked for identification "Exhibit G".

8. Your Trustee further reports that there are outstanding as of June 6, 1941, 9110 shares of the preferred stock of the debtor, which said preferred stock is owned by approximately 1000 different preferred stockholders, and that a list is filed herewith and made a part of this report showing the names and post office address or the address of the place of business of each of said stockholders, and marked for identification "Exhibit H".

9. Your Trustee reports that the principal creditors of the debtor consists of the owners of its various types of investment contracts, of which approximately 80,000 are now in force, and for which a reserve liability is carried on the books of the debtor; that there is filed herewith as a part of this report a list showing the name and post office address or place of business of the owner of each of such contracts. The said list contains in addition to the foregoing the following information concerning each contract:

[fol. 158] (a) Contract number.

(b) Number of payments made on contract.

(c) Actuarial reserve (this figure supports the reserve as shown on the Balance Sheets).

(d) Cash liability.

(e) Loans to contract owners.

(f) Additional credits (this applies only to series "B" contract owners).

There is also included as a part of the aforesaid list of contract holders a summary of each class of contract, showing the number of contracts thereof, the face amount, reserve

liability and cash surrender liability and contract loans and accrued interest thereon. In addition thereto there is shown as a part of said list of contract holders a list of the owners who have made payments on their contracts between April 4 and June 6, 1941. The aforesaid list is submitted to the Court in a sealed container and marked for identification "Exhibit J".

10. Your Trustee further reports that between April 10 and June 6, 1941, a number of the contract holders of the debtor made payments of interest and/or principal upon loans which they had theretofore obtained upon their contracts; that there is submitted herewith as a part of this report a list showing the names of such persons, the serial number of their respective contracts, the amounts of the payments made by such contract holders on their loans, and the amounts of payments made by such contract holders as interest on their loans, which said list is filed herewith as a part of this report marked for identification "Exhibit K".

11. Your Trustee reports that it has caused to be prepared as of June 6, 1941, a balance sheet of the assets and liabilities of the debtor, which balance sheet discloses the condition of the various funds as shown by the records of the debtor. A copy of said balance sheet is filed herewith as a part of this report and is marked for identification "Exhibit L".

12. Your Trustee further reports that it has caused to be prepared from the books and records of the debtor, but not verified by your Trustee by actual check of securities not in your Trustee's possession, as of June 6, 1941, a schedule showing the par value, book value and market value by funds of all securities owned by the debtor and the location [fols. 159-160] thereof, a copy of said schedule being filed herewith as a part of this report and marked for identification "Exhibit M".

Respectfully submitted, Central Trust Company,  
Trustee, by /s/ A. A. Payne, Vice President &  
Trust Officer.

August 5, 1941.

(Exhibits B, C, D, L & M, referred to in the foregoing order, are being transmitted in original form in accordance with instructions of Court Order entered March 7, 1942.)



[fol. 161] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO INTERVENE—Filed August 5, 1941

Dewey S. Godfrey, Receiver, moves for leave to intervene as defendant in this action, in order to assert the defenses set forth in his proposed petition to vacate and his proposed answer, of which copies are attached hereto, on the ground that under the order appointing him Receiver, a copy of which is attached hereto, his interest, as Receiver in protecting the Missouri contract holders and their liens on the securities deposited by the Debtor for Missouri contract holders under orders of the Securities Commissioner of the State of Missouri, will not be adequately represented in the above reorganization proceedings and movant will be bound by any judgment entered therein regarding your movant's duties as Receiver in Missouri and as guardian and protector of the liens and interests of the Missouri contract holders by reason of the securities deposited by the said Debtor to secure the payment of said contracts and in accordance with the rules, regulations, and public policy of the State of Missouri and its officials; also this movant, as Receiver of the assets and affairs of the Debtor company in the State of Missouri, is so situated with reference to certain securities deposited by the Debtor for the State of Missouri as to make him adversely affected by distribution or other disposition of property in the custody of or under the direction of this Court or the said Trustee appointed by this Court for the above named Debtor.

(Signed) Dewey S. Godfrey, Receiver of the Fidelity Assurance Association in the State of Missouri.

[fols. 162-166] *Duly sworn to by Dewey S. Godfrey. Jurat omitted in printing.*

[fol. 167] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION TO VACATE—Filed August 5, 1941

Comes now Dewey S. Godfrey, Receiver, and respectfully represents:

1. That on June 6th, 1941 a petition was filed herein by the Fidelity Assurance Association, the above named debtor,

praying that proceedings be had under Chapter 10 of the Act of Congress relating to Bankruptcy, and on said June 6th, 1941 an order was entered by this Court approving said petition and appointing the Central Trust Company of Charleston, West Virginia, as Trustee, said order of June 6th, 1941 being amended by this Court on June 10th, 1941.

2. That this Court is without jurisdiction over the subject matter because the debtor is an insurance company and as such is precluded from becoming a bankrupt or becoming reorganized in bankruptcy.

3. That the Court is without jurisdiction over the subject matter because debtor's petition filed herein shows on its face that the debtor is an insurance company and precluded from becoming a bankrupt or being reorganized in bankruptcy.

4. That the petition does not show that it was filed in good faith and that a feasible plan for reorganization could be arrived at and determined upon.

5. That the petition filed by debtor herein was not filed in good faith because in order to effect reorganization each and every one of all of the contracts sold by debtor and mentioned in debtor's petition would have to be rewritten and readjusted, the provisions therein changed, readjustments made with reference to options mentioned therein, readjustments made in cash value and paid-up contract value, a rewriting and readjustment of the reserve fund, the maturity and retirement reserve fund, the surplus participations, the cash commuted value, the optional settlements, the options settlements schedule, the insurance protection features and the provisions relating thereto with [fol. 168] reference to, protection for contract, fully paid contract, no further payments, increased cash availability, conditions of protection, termination of protection, reinstatement of protection, reserve requirements, and general terms; a rewriting and readjustment of the provisions relating to additional credits and contracts without insurance relating to annual credits, compound accumulated interest, payment of accumulated credits, increased value, and, reserve provisions; a rewriting and readjustment of the provisions of said contracts with reference to, discount for advance payments, paid-up contract and automatic conversion, grace and new contract, cash availability, advance

loan for payments, and, cash loan; that on numerous contracts issued by the debtor there is attached thereto a life insurance policy issued by the Lincoln National Life Insurance Company of Fort Wayne, Indiana, written and issued in accordance with and based upon the provisions in said annuity contracts issued; that a rewriting and readjustment of the provisions of the annuity contract would also require a rewriting and readjustment of the said life insurance policy; that various series of contracts have been issued and outstanding in the State of West Virginia and various other nineteen states of the United States, and varying amount of securities deposited with the said other states or their officials to insure the payment of said contracts; that the said deposit of securities with said other states and their officials as just stated is in accordance with the laws, regulations and public policy of said states for the security and protection of its citizens; that reorganization is not feasible in that said debtor cannot and will not be able to comply with the provisions of the Investment Company Act of 1940 as enacted by the Congress of the United States and approved by the President; that the said debtor well knew of all of the above at the time the petition for reorganization was filed herein and well knew that reorganization was impossible.

6. That there are prior proceedings pending in the State of Missouri and other of the nineteen states of the United States regarding annuity contract holders of debtor in said states which would best serve the interests of the creditors [fol. 169] of said debtor which creditors are composed of the said contract holders.

Wherefore, your Intervenor prays: (1) That the order entered herein on the 6th day of June, 1941 and as amended June 10th, 1941 approving the petition of said debtor praying that proceedings be had under Chapter 10 of the Act of Congress relating to Bankruptcy and enjoining and staying the proceedings theretofore commenced in the State of Missouri be vacated; (2) That debtor's petition for reorganization filed herein be dismissed; (3) That your petitioner have such other and further releases as is just.

(Signed) Dewey S. Godfrey, Receiver of the Fidelity Assurance Association in the State of Missouri.

(Signed) Rudolph K. Schurr, Attorney for Receiver,  
705 Olive Street, St. Louis, Missouri.

[fol. 170]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed August 5, 1941

Comes now intervenor, Dewey S. Godfrey, Receiver, and for his answer to debtor's petition, admits as to paragraph numbered I of debtor's petition that debtor is a corporation, duly organized and existing under the laws of the State of West Virginia and that said debtor was so incorporated on the 26th day of April, 1911 as the Fidelity Investment Loan Association and that its name was thereafter changed to Fidelity Investment Association and on or about December 31st, 1940 its name was again changed to Fidelity Assurance Association. For answer to the rest of the allegations in said paragraph I intervenor states that he is without knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

For answer to paragraphs numbered II and III intervenor states that he is without knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

Intervenor admits the allegations contained in paragraph numbered IV of debtor's petition.

For answer to paragraphs numbered V, VI, VII and VIII of debtor's petition intervenor states that he is without knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

For answer to paragraph numbered IX of debtor's petition, intervenor denies each and every allegation of fact therein contained.

For answer to paragraph numbered X of debtor's petition, intervenor states that he is without knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

For further answer to petition filed by debtors herein, intervenor respectfully represents:

1.) That this Court is without jurisdiction over the subject matter because the debtor is an insurance company and as such is precluded from becoming a bankrupt or becoming reorganized in bankruptcy.

2.) That the petition filed by debtor herein was not filed in good faith because in order to effect reorganization each



and every one of all of the contracts sold by debtor and mentioned in debtor's petition would have to be rewritten and readjusted, the provisions therein changed, readjustments made with reference to options mentioned therein, readjustments made in cash value and paid-up contract value, a rewriting and readjustment of the reserve fund, the maturity and retirement reserve fund, the surplus participation, the cash commuted value, the optional settlements, the optional settlements schedule, the insurance protection features and the provisions relating thereto with reference to, protection for contract, fully paid contract, no further payments, increased cash availability, conditions of protection, termination of protection, reinstatement of protection, reserve requirements, and general terms; a rewriting and readjustment of the provisions relating to additional credits and contracts without insurance relating to annual credits, compound accumulated interest, payment of accumulated credits, increased value, and, reserve provisions; a rewriting and readjustment of the provisions of said contracts with reference to, discount for advance payments, paid-up contract and automatic conversion, grace and new contract, cash availability, advance loan for payments, cash loan, warrant and cash surrender and the schedules with reference to, paid-up contract and automatic conversion, cash availability, advance loan for payments, and, cash loan; that on numerous contracts issued by the debtor there is attached thereto a life insurance policy issued by the Lincoln National Life Insurance Company of Fort Wayne, Indiana, written and issued in accordance with and based upon the provisions in said annuity contracts issued; that a rewriting and readjustment of the provisions of the annuity contract would also require a rewriting and readjustment of the said life insurance policy; that various series of contracts have been issued and outstanding in the State of West Virginia and various other nineteen states of the United States, and varying amount of securities deposited with the said other states or their officials to insure the payment of said contracts; that the said deposit of [fol. 172-173] securities with said other states and their officials as just stated is in accordance with the laws, regulations and public policy of said states for the security and protection of its citizens; that reorganization is not feasible in that said debtor cannot and will not be able to comply with the provisions of the Investment Company Act of

1940 as enacted by the Congress of the United States and approved by the President; that the said debtor well knew of all of the above at the time the petition for reorganization was filed herein and well knew that reorganization was impossible.

3.) That there are prior proceedings pending in the State of Missouri and other of the nineteen states of the United States regarding annuity contract holders of debtor in said states which would best serve the interests of the creditors of said debtor which creditors are composed of the said contract holders.

(Signed) Dewey S. Godfrey, Receiver of the Fidelity Assurance Association in the State of Missouri.

(Signed) Rudolph K. Schurr, Attorney for Receiver,  
705 Olive Street, St. Louis, Missouri.

[fol. 174] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO VACATE OR MODIFY ORDER OF JUNE 10, 1941—  
Filed August 5, 1941

Now comes John B. Gontrum, Insurance Commissioner of the State of Maryland, appearing specially and for the sole purpose of prosecuting this motion, and moves this Honorable Court to vacate its order passed herein on June 10, 1941, modifying the order passed herein on June 6, 1941, or, in the alternative, to modify said order by striking therefrom the last paragraph thereof, and by providing that said order shall not be applicable to the securities heretofore assigned to and deposited with the Insurance Commissioner of Maryland by the Debtor. And for cause of his said motion, this Movant says that this Honorable Court was without jurisdiction to pass its said order of June 10, 1941, modifying its said order of June 6, 1941, because:

1. The securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor were so assigned and deposited in accordance with the laws of the State of Maryland, Sections 218

to 234, inclusive, of Article 48A of the Code of Public General Laws of Maryland as enacted by Chapter 530 of the Acts of 1931, and the said securities are now, under the said laws of the State of Maryland, in the custody and possession of this Movant as Insurance Commissioner of the State of Maryland. As Insurance Commissioner of the State of Maryland, this Movant is the mere agent of the State of Maryland and in his capacity as such, is beyond the reach of the judicial power of this Honorable Court, and the order of this Honorable Court of June 10, 1941, modifying the previous order of June 6, 1941, in so far as it is directed against this Movant as Insurance Commissioner of the State of Maryland, is void under the Eleventh Amendment to the Constitution of the United States.

2. This Court has no jurisdiction *in personam* over this Movant as Insurance Commissioner of the State of Maryland because he does not reside in the Southern District of West Virginia and is not subject to the service of process therein and has not been served with process therein.

3. The securities assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor were, in accordance with the laws of the State of Maryland, so deposited and assigned, and are now held by this Movant, in trust, as security for all the holders of contracts or other obligations of the Debtor sold, negotiated, issued or accrued in the State of Maryland, and said securities therefore do not constitute property of the Debtor within the meaning of Chapter 10 of the Bankruptcy Act so as to give this Honorable Court jurisdiction thereover.

4. The securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor were, in accordance with the laws of the State of Maryland, so assigned and deposited, and are now held by this Movant, in trust as security for all the holders of contracts or other obligations of the Debtor sold, negotiated, issued or accrued in the State of Maryland, and title thereto is now in this Movant and not in the Debtor. This Movant, [fol. 176] therefore, has a substantial adverse claim to and title in said securities, and this Honorable Court therefore has no jurisdiction to require this Movant, by summary order, to surrender the said securities to the Trustee appointed herein by this Honorable Court, and a plenary

action against this Movant in a proper forum would be necessary to enable the Trustee designated herein to recover possession of said securities from this Movant.

5. This Honorable Court has no jurisdiction under Chapter 10 of the Bankruptcy Act to declare, in a summary order passed herein without notice to this Movant, that the securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor, in accordance with the laws of said State, are property of the Debtor within the meaning of Chapter 10 of the Bankruptcy Act.

6. The securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor, and now held by this Movant as such Insurance Commissioner, were assigned and deposited in accordance with the laws of the State of Maryland, Sections 218 to 234 of Article 48A of the Code of Public General Laws of Maryland, and under an agreement made with the Insurance Commissioner of Maryland, pursuant to said laws, that said securities should be held by said Insurance Commissioner of the State of Maryland in trust as security for all the holders of contracts of the Debtor sold, negotiated, issued or accrued in the State of Maryland. The assignment and deposit of said securities in accordance with the said laws of the State of Maryland, and the agreement with the Insurance Commissioner of the State of Maryland made pursuant thereto, constitute a contract in the public authority within the meaning of Chapter 10 of the Bankruptcy Act, and this Honorable Court is without jurisdiction to reject, alter, modify or abrogate said contract.

[fols. 177-180] 7. The laws of the State of Maryland, Sections 218 to 234, inclusive, of Article 48A of the Code of Public General Laws of Maryland, under which the Debtor was required to assign to and deposit with the Insurance Commissioner of the State of Maryland the securities now held by this Movant, were enacted by the State of Maryland for the better protection of its citizens in the exercise of the powers reserved to it as a sovereign State by the Tenth Amendment to the Constitution of the United States, and the bankruptcy laws of the United States cannot and do not infringe upon such laws of the State of Maryland. Therefore, this Honorable Court has no jurisdiction under



any supposed authority conferred by the Bankruptcy Act, to require this Movant as Insurance Commissioner of the State of Maryland to surrender such securities to the Trustee herein in disregard of the laws of the State of Maryland.

(S.) John B. Gontrum, Insurance Commissioner of the State of Maryland. (S.) H. Vernon Eney and Guy B. Brown, Attorneys for John B. Gontrum, Insurance Commissioner of the State of Maryland, appearing specially and for the sole purpose of prosecuting this motion.

*Duly sworn to by John B. Gontrum. Jurat omitted in printing.*

[fol. 181] IN UNITED STATES DISTRICT COURT

[Title omitted]

**ANSWER**—Filed nunc pro tunc as of August 4, 1941

To the Honorable Ben Moore, Judge of the District Court of the United States, for the Southern District of West Virginia:

L. H. Brooks, Frederic Leake, and A. L. Goldberg, Jr., allege that they are creditors of Fidelity Assurance Association, the above named debtor. L. H. Brooks, as Trustee for his son, — Brooks, is the holder and owner of a certificate issued by the debtor corporation on which he has paid \$1650.00 and which has fully matured in the amount of \$2500.00. A. L. Goldberg, Jr., is Trustee for Richard Goldberg, and is the holder and owner of a certificate for \$2500.00, on which he has paid the debtor the sum of approximately \$390.00. Frederic Leake is the holder and owner of a certificate for \$1250.00 on which he has paid the sum of \$15.00 monthly from June 25, 1940, through March, 1941. For answer to the petition of the debtor verified [fol. 182] June 5th, 1941, and filed June 6th, 1941, praying that proceedings be had under Chapter X of the Act of Congress relating to bankruptcy, they answer as follows:

#### *First Defense*

(1) The allegations contained in Section I of the petition are admitted.

(2) It is denied that the debtor is a corporation as defined by the Federal Bankruptcy Act which could be adjudged a bankrupt under said Act.

(3) The allegations contained in Section III of the petition are admitted.

(4) They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Section IV of the petition.

(5) They are without knowledge or information sufficient to form belief as to the truth of the allegations contained in Section V of the petition.

(6) They admit the allegations contained in Section VI of the petition.

(7) They admit the allegations contained in the first paragraph of Section VII of the petition. They admit the allegation in the second paragraph of Section VII of the petition that the debtor has been unable to meet its obligations [fol. 183] as they mature. Respondent L. H. Brooks would show that prior to the filing of the receivership proceedings in the State Court in West Virginia, he made demand upon the debtor corporation for payment of the amount due him under his secured contract and payment has not been made to this date. They deny that if the rights of the outstanding contract holders are modified as suggested in the second paragraph of Section VII of the petition, debtor will be able to meet its reserve requirements and will be able to comply with the Investment Company Act of 1940 and will be enabled to resume the operation of its business. They admit that the existing and outstanding contracts of the debtor sold in the State of Tennessee are secured by a deposit of securities made in the State of Tennessee and that some of the deposits were made in other states but the exact amount of those deposits and the various States in which the deposits were made are unknown to respondents. They construe the allegation in the second paragraph of Section VII of the petition "that the rights of all contract holders must be modified as above set forth in order that debtor may be permitted to obtain adequate relief" to mean that the holders of existing and outstanding contracts of the debtor will have to give up some of their rights

and interests in the deposits made with the different States in which the Company is doing business for the protection of such contract holders and deny that this can lawfully be required of them.

Respondents further say that this debtor was not entitled to file this petition under Chapter X of the Bankruptcy Act because the rights of the secured contract holders in the securities deposited with the several States in which the Company was doing business for the protection of contract holders in those States cannot be affected or impaired in any way by the reorganization proceedings.

(8) The allegations contained in Section VIII of the petition are admitted.

(9) The allegation that it was the desire of debtor that a plan of reorganization be effected under the provisions of Chapter X of the Bankruptcy Act is denied.

(10) The allegations contained in Section X of the petition are denied.

(11) All allegations contained in the petition, not heretofore expressly admitted or denied are here and now generally denied as fully as if separately and specifically denied.

### *Second Defense*

(12) The statutes of the State of Tennessee require investment companies, such as the debtor, engaging in business in that State, to deposit and maintain securities at no time less than 100% of the issuing company's cash or current contract liability on all outstanding investment contracts sold in the State of Tennessee. By Chapter 209 of [fol. 185] the Public Acts of 1939, it was provided that the Commissioner of Insurance and Banking of the State of Tennessee should hold as Custodian the securities deposited for the benefit of the holders of the investment contracts coming within the provisions of said Act. By Chapter No. 157 of the Public Acts of 1941, the State Treasurer of Tennessee was made the Custodian of all securities deposited with the State or any Department thereof. The laws of Tennessee further provide that only upon discharge in full of all liabilities on all investment contracts sold in the State of Tennessee, and for which trust deposit

is maintained, shall the issuing company be entitled to a release and return of the securities so deposited.

In compliance with the laws of the State of Tennessee, and in order to obtain a permit to do business and issue its investment contracts in the State of Tennessee, the debtor company made a deposit of securities with the Commissioner of Insurance and Banking of the State of Tennessee. After receivers had been appointed for the debtor company in the State Court of West Virginia, respondents, on April 21st, 1941, filed a bill in the Chancery Court of Davidson County, Tennessee, for the benefit of themselves and all other holders of investment contracts sold in the State of Tennessee to enforce the lien of said securities and to obtain distribution among the contract holders for whose benefit the deposit was made. Such proceedings in said suit were had as resulted in the entry of a decree of the Chancery Court of Davidson County in said cause styled L. H. Brooks, et al. v. Fidelity Assurance Association, et al., [fol. 186] Rule No. 57686, on April 24th, 1941, sustaining said bill as a General Creditor's bill for the benefit of all the holders of investment contracts of the debtor company sold in the State of Tennessee and impounding said securities by directing the Commissioner of Insurance and Banking of the State of Tennessee to deliver the securities to the State Treasurer in accordance with the provisions of Chapter 157 of the Public Acts of 1941, and enjoining the State Treasurer from making any disposition of said securities except under orders or decrees of the Court in said cause. Said decree directed that publication be made notifying all the holders of investment contracts sold in the State of Tennessee to file and prove their claims against the investment company on or before the first day of November, 1941. By a decree entered in said cause, it was further ordered that publication be made for the Receivers of Fidelity Assurance Association appointed by the Circuit Court of Kanawha County, notifying them of the filing of the bill requiring them to appear and answer at an early rule day of Court and to show cause, if any they might have, why the securities impounded should not be sold and distributed for the benefit of the holders of investment contracts of the defendant corporation sold in the State of Tennessee. Publication was made in accordance with the directions contained in said decrees and an order pro con-



fesso was duly entered against the defendant, Fidelity Assurance Association, and the Receivers appointed in the State Court of West Virginia. Since that time various contract holders have filed claims aggregating approximately \$—.

[fol. 187] A duly certified transcript of the proceedings in said suit in the Chancery Court of Davidson County, Tennessee, is annexed hereto as Exhibit "A" and made a part of this answer.

(13) Respondents aver that the securities deposited in the State of Tennessee are impressed with a lien in favor of the holders of investment contracts of the debtor company sold in the State of Tennessee which may not be avoided under any of the provisions of the Bankruptcy Act, and the Chancery Court of Davidson County, Tennessee, has exclusive jurisdiction to make the distribution among the contract holders entitled to the benefit of the deposit.

Respondents deny that there can be any plan of reorganization of the debtor which will be fair and equitable and feasible unless said plan gives full recognition to the statutes of the State of Tennessee above referred to providing that only upon discharge in full of all liabilities on investment contracts sold in the State of Tennessee and for which the deposit in that State is maintained, shall the issuing company be entitled to a release and return of the securities so deposited. They say that a trustee appointed to effect a plan of reorganization stands in the shoes of the debtor corporation.

Respondents would show to the Court that they will not consent to any plan of reorganization which deprives them [fol. 188] of any of their right, title or interest in the deposited securities in the State of Tennessee and they believe that all of the other contract holders for whose benefit said deposit of securities in the State of Tennessee is maintained will feel the same way when they are informed of the situation. They are advised and aver that this Court cannot, against the consent of any contract holder for whose benefit the deposit of securities was maintained in the State of Tennessee, take away the right of that contract holder to have his money that he is entitled to paid back to him out of deposited securities.

*Third Defense*

(14) They allege that it is unreasonable to expect that a plan of reorganization of debtor corporation can be effected herein.

(15) They aver that at the time of the filing of the petition herein prior proceedings were pending in the Courts in various States in which the debtor company was doing business (as disclosed by pleadings herein), and it appears that the interests of creditors would be best subserved in such prior proceedings.

(16) They aver that on December 14th, 1938, the Securities & Exchange Commission filed an action for an injunction in the United States District Court for the Eastern District of Michigan, Southern Division, against the debtor [fol. 189] company, then known as Fidelity Investment Association, alleging that the company was engaged in acts and practices in the sale of its securities which constituted violations of the fraud provisions of the Securities Act of 1933. On the same day an order for the defendant to show cause was issued and on December 22nd, 1938 the company filed an answer to the bill generally denying all allegations of impropriety. On the same day defendant association gave its consent to a final judgment enjoining it from engaging in the acts alleged in the complaint. This proceeding seriously impaired the public confidence in the defendant company. The petition shows that for five months prior to the filing of the petition it had not engaged in business of issuing investment contracts because it could not comply with the Investment Act of 1940. Then followed the receivership in the State Court of West Virginia. And finally this bankruptcy proceeding. The petition shows that the company is not now licensed to do either an insurance business or a business as investment company anywhere. Most of the investors who have bought the defendant's investment contracts are people of moderate means who have put their savings in this company. They are tired of the changing of names and receivership and bankruptcy proceedings and want to get their money out of the deposits protecting their contracts. If there are any contract holders who would give their consent to a reorganization, it is those who have no protection by way of deposited securities.

Those who have an interest in the securities cannot be expected to consent to give up their interest. Yet the petition shows that the rights of *all* contract holders must be modified [fol. 190] in order that the debtor may be permitted to obtain adequate relief.

#### *Fourth Defense*

(17) Respondents allege that the petition was not filed in good faith.

(18) Respondents aver that the petition was filed with liquidation in mind. The end sought to be gained by the petition was to get a final order approving the petition under Chapter X which would be followed by an order adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with.

Wherefore, respondents pray that the petition be dismissed with costs.

L. H. Brooks, Trustee; Frederic Leake, A. L. Goldberg, Jr., Trustee; Answering Creditors.

(S.) Fyke Farmer, Attorney for Answering Creditors. Address: American National Bank Bldg., Nashville, Tennessee.

[fol. 191] *Duly sworn to by Fyke Farmer. Jurat omitted in printing.*

{fol. 192] (At a District Court of the United States for the Southern District of West Virginia, at Charleston, in said District, on August 9, 1941.)

In the Matter of FIDELITY ASSURANCE ASSOCIATION, Debtor  
Proceedings for Corporate Reorganization.

No. 4514

#### ORDER MODIFYING ORDERS OF JUNE 6 AND JUNE 10, 1941

This day came the Central Trust Company, Trustee for the debtor herein and presented to the court its motion in writing, which is hereby ordered filed, moving the court that an order entered herein on June 6, 1941 and an order entered herein on June 10, 1941 be modified in the respects specified in said petition.

And it appearing to this court from said petition and from the proceedings heretofore had herein that said petition is presented herein pursuant to an informal conference called at the instance of this court on July 9, 1941 and held

in the court room of this court at two o'clock in the afternoon of said day; that said conference was attended by the representatives of official depositaries of various of the states in which contracts of the debtor herein were sold prior to the filing of the petition herein, and was also attended by representatives of receivers appointed in certain of such states by the Trustee herein and its counsel and by an attorney for the Securities and Exchange Commission; and

It further appearing that said conference of July 9, 1941 was called by this court for the purpose of working out by agreement a feasible and equitable method to secure the co-operation of said state depositaries, receivers and others to facilitate the administration of debtor herein; and

It further appearing that portions of said orders of June 6 and June 10, 1941, would impede or prevent such co-operation, with resultant expense which can be avoided by modifying such portions of said order; and

It further appearing to this court that modification of said orders in the respects hereinafter indicated, will promote co-operation among the parties without adversely affecting the estate of the debtor herein or the rights of any of the persons interested in said estate.

And it further appearing to the court that certain of the receivers appointed by the respective state courts including the receivers appointed in Ohio and West Virginia have turned over, the latter under protest, to the Trustees herein the property in the custody, possession or control of each of them as such receiver, now therefore upon the petition of the Central Trust Company, Trustee for the debtor herein, duly verified the 9th day of August, 1941, which petition was joined in at the hearing thereon by counsel for the Treasurer of the State of Ohio and for the official depository of the State of Illinois, upon petitions for relief of a similar nature filed herein by other persons in interest and upon all the proceedings heretofore had herein, including the informal conference hereinbefore referred to, held in this court on July 9, 1941;

It is ordered that the order of this court dated June 6, 1941, be amended by striking therefrom the following language:

"It is further ordered that the receivers, H. Isaiah Smith and Ross B. Thomas, heretofore appointed by the Circuit



Court of Kanawha County, West Virginia, of the property and assets of said debtor situate in the States of West Virginia, be and hereby are directed and ordered to surrender and deliver to said trustee all of the property, assets and business of the debtor, of whatsoever nature and wheresoever situated, now in their possession and control; and said receivers and their agents and employees are hereby expressly enjoined and restrained from in anywise interfering with the exclusive possession and control of said trustee of said property and assets of said debtor and from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any of said property and assets.

"It is further ordered that each receiver or receivers heretofore appointed by any State Court in the States of Ohio, Indiana, Illinois, Wisconsin, Kentucky, Tennessee, New York and Pennsylvania be and they are hereby directed to surrender and deliver to said trustee all of the property and assets of the debtor, of whatsoever nature and wheresoever situate, now in their possession and control; and each of said receivers is hereby enjoined and restrained from in anywise interfering with the exclusive possession and control of said trustee of said property and assets of said debtor and from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any of said property and assets of said trustee."

Whereupon the said portions of said order of June 6, 1941, shall be and become and they are hereby declared to be null, void and of no effect; and it is further ordered that in lieu of said language there be inserted in said order of June 6, 1941, the following:

"It is further ordered that the receivers, H. Isaiah Smith and Ross B. Thomas, heretofore appointed by the Circuit Court of Kanawha County, West Virginia, of the property and assets of said debtor situate in the State of West Virginia, be and hereby are directed and ordered to surrender and deliver to said trustee all of the property, assets and business of the debtor, of whatsoever nature and wheresoever situated, now in their possession and control except such property as was on April 11, 1941, in possession custody or control of any state official, whether the same be in the form of stocks, bonds, debentures, money or other

form, for the purpose of securing the creditors or contract holders of the said Fidelity Assurance Association, Fidelity Investment Association or Fidelity Investment Loan Association against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other purpose; and it is further ordered that said Receivers and their agents and employees, are hereby enjoined and restrained from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any property of said Debtor without exception whether hereinabove mentioned or not.

"It is further ordered that each receiver or receivers heretofore appointed by any State Court in the State of Ohio, Indiana, Illinois, Wisconsin, Kentucky, Tennessee, New York and Pennsylvania be and they are hereby directed to surrender and deliver to said trustee all of the property and assets of the debtor, of whatsoever nature and wheresoever situate, now in their possession and control except such property on April 11, 1941, in the possession, custody or control of any state official, whether the same be in the form of stocks, bonds, debentures, money or other form, for the purpose of securing the creditors or contract holders of the said Fidelity Assurance Association, Fidelity Investment Association or Fidelity Investment Loan Association against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other purpose; and it is further ordered that each of said Receivers and their agents and employees, are hereby enjoined and restrained from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any property of said Debtor without exception whether hereinabove mentioned or not."

And it is further ordered that said modification of said order of June 6, 1941, be and it is made *nunc pro tunc* as of the date upon which said order was originally made and entered herein; and

It is further ordered that as modified said order of June 6, 1941, shall read as follows:

(At a District Court of the United States for the Southern District of West Virginia, at Charleston, in said District, on June 6, 1941.)

In the Matter of FIDELITY ASSURANCE ASSOCIATION, Debtor  
In Proceedings for Corporate Reorganization

No. 4514

Order Approving Debtor's Petition

This day came Fidelity Assurance Association, by James R. Fleming, its attorney, and presented its verified petition for its reorganization under chapter 10 of the Federal Bankruptcy Act; and it appearing from said petition that the debtor is unable to meet its debts as they mature, and that the debtor desires to effect a reorganization under said corporate reorganization Act, and that it is not a municipal, banking, insurance nor railroad corporation, nor a building and loan association, but is a corporation that could become [fol. 193] a bankrupt under section 4 of the Bankruptcy Act, and has its principal assets in this district; and the Judge being satisfied that said petition of said debtor complies with said chapter 10 of the Bankruptcy Act, and has been filed in good faith:

Now, upon motion of James R. Fleming, the attorney for the petitioner, it is ordered, adjudged and decreed that the said petition be and it is hereby approved as properly filed under said chapter 10 of the Bankruptcy Act, and it is hereby determined that said petition has been filed in good faith.

It is further ordered that Central Trust Co., a corporation, of Charleston, be and hereby is appointed trustee of and for the debtor and its estate, including all of its property and assets, of whatsoever kind and description and wheresoever situated.

It is further ordered that said trustee give a bond to the United States of America in the sum of \$50,000.00 for the faithful performance of its duties as such trustee, and that upon the qualification of the trustee and the execution and filing of the bond aforesaid with the Clerk of this Court, said trustee shall take all of the property and assets of said debtor, of whatsoever kind and description and wheresoever situated into his exclusive possession and control, and shall be vested with all the title and rights, subject to the same duties, and shall exercise, subject to the control of the Court and consistently with the provisions of said chap-

ter 10, all the powers of a trustee appointed pursuant to section 44 of the Bankruptcy Act, and such additional rights and powers as a receiver in equity would have if appointed by a Court of the United States for the property of the debtor, and, subject to the authorization and control of this Court, shall carry on, manage, conduct and operate the business of the debtor in its usual course. It is further ordered that the receivers, H. Isaiah Smith and Ross B. Thomas, heretofore appointed by the Circuit Court of Kanawha County, West Virginia, of the property and assets of said debtor situate in the State of West Virginia, be and hereby are directed and ordered to surrender and deliver to said trustee all of the property, assets and business of the debtor, of whatsoever nature and wheresoever situated, now in their possession and control except such property as was on April 11, 1941, in possession, custody or control of any state official, whether the same be in the form of stocks, bonds, debentures, money or other form, for the purpose of securing the creditors or contract holders of the said Fidelity Assurance Association, Fidelity Investment Association or Fidelity Investment Loan Association against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other purpose; and it is further ordered that said Receivers and their agents and employees, are hereby enjoined and restrained from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any property of said Debtor without exception whether hereinabove mentioned or not.

It is further ordered that each receiver or receivers heretofore appointed by any State Court in the State of Ohio, Indiana, Illinois, Wisconsin, Kentucky, Tennessee, New York and Pennsylvania be and they are hereby directed to surrender and deliver to said trustee all of the property and assets of the debtor, of whatsoever nature and wheresoever situate, now in their possession and control except such property on April 11, 1941, in the possession, custody or control of any state official, whether the same be in the form of stocks, bonds, debentures, money or other form, for the purpose of securing the creditors or contract holders of the said Fidelity Assurance Association, Fidelity Investment Association or Fidelity Investment Loan Association against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other



purpose; and it is further ordered that each of said Receivers and their agents and employees, are hereby enjoined and restrained from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any property of said Debtor without exception whether hereinabove mentioned or not.

It is further ordered that all creditors and stockholders of debtor and all other persons, firms, associations and corporations, and all persons claiming or acting by, through or under them, including all sheriffs and marshals and other officers, agents, attorneys, solicitors, representatives and employees of them, or any of them, and all receivers of State Courts heretofore or hereafter appointed, or any of them, are hereby enjoined and restrained from instituting, continuing or prosecuting any action at law or suit or proceeding in equity, or any other proceeding, against said debtor or trustee in any court of law or equity or other court or tribunal, or otherwise, and from executing or issuing, or causing, the execution or issuance out of any court, or any public office, of any writ, process, summons, garnishment, attachment, subpoena, replevin, execution or other proceeding for the purpose of examining or taking possession of or interfering with any property constituting the estate of the debtor, or attempting to take into their possession any part of the property constituting such estate, wheresoever situate; and all such persons, firms, associations or corporations are hereby enjoined and restrained from seizing, selling, removing, transferring, disposing of or interfering with, or attempting so to do, any property or assets of said debtor or said trustee, whether or not in their possession or otherwise, and from doing any act or thing whatsoever to interfere with the possession, management and control by said trustee of debtor's assets, property and effects; and all persons, firms and corporations are hereby enjoined and stayed from commencing or continuing any judicial proceeding in any court to enforce any lien or right of any kind or character upon the estate or property of debtor until further order of this Court.

It is further ordered that said trustee is hereby vested with the power, pending further order of this Court, to conduct, manage, maintain, operate and keep in proper condition and repair all of said assets and property of said debtor, and in connection therewith to employ, discharge and

fix the compensation of all agents and employees of the debtor, and to collect and receive all of the income, rents, revenue, issues and profits of said assets and property of said debtor, and to collect all outstanding accounts receivable, and generally to do any act necessary to carry on the business of the debtor, subject to such supervision and control by this Court as by further orders herein it may from time to time exercise.

This Court reserves full right and jurisdiction to make from time to time such orders amplifying, extending, or limiting or otherwise modifying this order as to the Court may at any time seem proper.

Ben Moore, U. S. D. J.

Dated this 6th day of June, 1941.

It is further ordered that as so amended said order shall be deemed to have taken effect and become operative as of June 6, 1941; and

It is further ordered that the order of this Court dated June 10, 1941, be amended by striking therefrom the following language:

"all persons heretofore designated either by name or official position, and all other persons and officials not herein specifically named, who may have in their possession, custody or control, any assets, stocks, bonds, debentures, money, choses in action, real estate, personal property, or property of other kind or character, belonging to said debtor, shall forthwith surrender and deliver all such property to said Trustee; and all said persons and officials are hereby enjoined and restrained from in anywise interfering with the exclusive control and possession by said Trustee of said property and assets of said debtor, and are further enjoined and restrained from selling, assigning, concealing, encumbering, transferring, or otherwise disposing of or affecting any of said property and assets of said debtor."

"It is further ordered and decreed that any and all property heretofore placed in the possession, custody or control of any state official by the Fidelity Assurance Association, the Fidelity Investment Association, or the Fidelity Investment Loan Association, whether the same be in the form of stocks, bonds, debentures, money, or other form, for the purpose of securing the creditors or contract holders of the

said Fidelity Assurance Association, Fidelity Investment Association, or Fidelity Investment Loan Association against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other purpose, is hereby adjudged for the purposes of this order to be assets of the debtor herein and subject to this order."

Whereupon the said portions of said order of June 10, 1941, shall be and become and they are hereby declared to be null, void and of no effect; and it is further ordered that in lieu of said language there be inserted in said order of June 10, 1941, the following:

"all persons heretofore designated either by name or official position, and all other persons and officials not herein specifically named who may have in their possession, custody or control any property of any kind or character heretofore placed in the possession, custody or control of any state official by the Fidelity Assurance Association, the Fidelity Investment Association or the Fidelity Investment Loan Association, whether the same be in the form of stocks, bonds, debentures, money or other form, for the purpose of securing the creditors or contract holders of the said Fidelity Assurance Association, Fidelity Investment Association or Fidelity Investment Loan Association against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other purpose, and their agents and employees, are hereby enjoined and restrained from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any of said property."

[fol. 194] And it is further ordered that said modification of said order of June 10, 1941, be and it is made *nunc pro tunc* as of the date upon which said order was originally made and entered herein; and

It is further ordered that as modified said order of June 10, 1941, shall read as follows:

(At a District Court of the United States for the Southern District of West Virginia, at Charleston, in said District, on June 10, 1941.)

# **In Proceedings for Corporate Reorganization**

**No. 4514**

**In the Matter of FIDELITY ASSURANCE ASSOCIATION, Debtor**

## **Order Clarifying Authority and Duties of Trustee**

This day came the Central Trust Company, heretofore appointed and qualified to act as Trustee for the debtor in this cause and presented to the Court its motion, in writing, moving the Court that the order heretofore entered herein on June 6, 1941, approving the debtor's petition be amended and clarified in that portion thereof pertaining to the delivery of assets of the said Fidelity Assurance Association to the said Trustee.

Upon consideration whereof, and the Court having inspected said written motion, and the said written motion appearing in all respects proper, the same is ordered filed; and it appearing to the Court that good cause is now shown for the amendment of said order, and the Court being of opinion that the said order should be so amended and clarified, it is accordingly adjudged, ordered and decreed that the following named persons and officials, to-wit:

S. Leigh Call, % Gillespie, Burke & Gillespie, 508 Reisch Building, Springfield, Illinois;

Charles R. Fisher, % State Auditor's Office, Des Moines, Iowa;

Richard T. James, Auditor, State of Indiana, Indianapolis, Indiana;

Hon. Richard McIntyre, Special Attorney, State Corporation Commission, Topeka, Kansas;

John A. Lloyd, Division of Insurance, Columbus, Ohio;

Peter F. Hagan and I. H. Krekstein, % Hirschwold, Goff & Rubin, 808-18 North American Building, Broad Street below Chestnut, Philadelphia, Pennsylvania;

Tom B. Wilson and N. J. Lippard, 421 Frick Building, Pittsburgh, Pennsylvania;

Howard L. Smith, % Banking Commission, Madison, Wisconsin;



Dewey S. Godfrey, Suite 525, 705 Olive Street, St. Louis, Missouri;

State Securities Commission, Robert Harris, Secretary, Montgomery, Alabama;

Securities Commissioner, Dover, Delaware;

Secretary of State, Springfield, Illinois;

Commissioner of Insurance, Securities Commission, Indianapolis, Indiana;

Securities Commissioner, Des Moines, Iowa;

Barton Griffith, Receiver, National Bank of Topeka, Kansas, Topeka, Kansas;

Commission of Securities, Securities Division, Topeka, Kansas;

Division of Securities, Frankfort, Kentucky;

Insurance Commissioner, State Insurance Department of Maryland, Baltimore, Maryland;

Securities Commissioner, Jefferson City, Missouri;

Securities Commissioner, Columbus, Ohio;

Pennsylvania Securities Commission, Harrisburg, Pennsylvania;

Commissioner, Department of Insurance and Banking, Nashville, Tennessee;

G. A. Bowles, Commissioner of Insurance, and C. M. Chichester, Director, Securities Division, Richmond, Virginia;

Insurance Commissioner, Charleston, West Virginia;

Securities Commissioner, Madison, Wisconsin;

Securities Commissioner, Tallahassee, Florida,

all persons heretofore designated either by name or official position, and all other persons and officials not herein specifically named who may have in their possession, custody or control any property of any kind or character heretofore placed in the possession, custody or control of any state official by the Fidelity Assurance Association, the Fidelity Investment Association or the Fidelity Investment Loan

Association, whether the same be in the form of stocks, bonds, debentures, money or other form, for the purpose of securing the creditors or contract holders of the said Fidelity Assurance Association, Fidelity Investment Association or Fidelity Investment Loan Association against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other purpose, and their agents and employees, are hereby enjoined and restrained from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any of said property.

Ben Moore, U. S. D. J.

It is further ordered that this order is not, is not intended to be and shall not be taken to be an adjudication of any of the questions which might have arisen out of such portions of said orders of June 6 and June 10, 1941, or either of them, as by this order are deleted from said orders, respectively, it being the specific purpose of this order to so frame the orders of June 6 and June 10, 1941, and to so dispose of the subject matter thereof as to avoid the necessity of any judicial determination of said questions, or any of them, at this time; and

It is further ordered that except as hereby modified, said orders of June 6, 1941, and June 10, 1941, shall be and are and shall continue in effect as entered; and

It is further ordered that this Court reserves jurisdiction to enter at any time an order or orders amending, modifying, altering, vacating or revoking this order and said orders of June 6, 1941, and June 10, 1941, or any of them.

Edgar B. Sims, Auditor, etc., State of West Virginia, and Ross B. Thomas and H. Isaiah Smith, West Virginia state court receivers, object and except to the entry of said "order modifying orders of June 6 and June 10, 1941," insofar as it affects them on the ground that the Court is without jurisdiction so to order and it is improperly and unlawfully an order by the Court to and against the State of West Virginia and the officials legally representing said state as its officers and agents; further that said West Virginia state court receivers were not invited to attend said informal conference of July 9, 1941, and were not present in person or by attorney thereat; and further that the status quo of the various funds mentioned in said order should only be

preserved if the Court has jurisdiction thereof after there is returned to the West Virginia State Court Receivers the funds turned over by them to the Trustee under protest by virtue of the original orders of the Court entered on June 6, June 10 and June 14, 1941.

And it is further ordered that the injunctive provisions of this order and of the orders referred to herein are not intended to and shall not be deemed to and do not prevent the official depositaries of the several states from collecting income accrued and currently accruing on the securities in their possession, custody or control.

Ben Moore, U. S. D. J.

August 9, 1941.

[fol. 195] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR ORDER MODIFYING ORDERS OF JUNE 6, 1941 AND JUNE 10, 1941—Filed August 9, 1941

The petition of Central Trust Company, heretofore appointed Trustee herein, respectfully shows:

1. That under date of June 6, 1941 an Order Approving Debtor's Petition was entered herein, wherein, among other things, the receivers, Isaiah Smith and Ross B. Thomas, heretofore appointed by the Circuit Court of Kanawha County, West Virginia, of the property and assets of said debtor situate in the State of West Virginia, and the receivers appointed by any state court in Ohio, Indiana, Illinois, Wisconsin, Kentucky, Tennessee, New York and Pennsylvania were directed and ordered to surrender and deliver to said Trustee all of the property, assets and business of the debtor, of whatsoever nature and wheresoever situated, now in their possession and control, and said receivers and their agents and employees were enjoined from in anywise interfering with the exclusive possession and control of said Trustee of said property and assets of said debtor and said state receivers were enjoined from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any of said property and assets.

2. That in said order of June 6, 1941 the Court reserved full right and jurisdiction to make from time to time such orders, amplifying, extending, or limiting or otherwise modifying said order, as to the Court might at any time seem proper.

3. That under date of June 10, 1941, upon motion of Central Trust Company, an Order Clarifying Authority and Duties of Trustee was entered herein, which Order named certain persons and officials of various states and ordered that said persons or officials therein designated and all other persons or officials not specifically named therein who may have in their possession custody and control any assets [fol. 196] of said debtor should forthwith surrender and deliver all such property to said Trustee, and enjoining said persons and officials from in any way interfering with the exclusive control and possession of said property and assets of said debtor. It was further ordered by said Order of June 10, 1941, that any and all property theretofore placed in custody or control of any state official by Fidelity Assurance Association, Fidelity Investment Association or Fidelity Investment Loan Association for the purpose of securing the creditors or contract holders thereof against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other purpose, was thereby adjudged for the purposes of said Order to be assets of the debtor herein and subject to said Order.

4. That questions have arisen between the Trustee herein and the various stated, state officials and state receivers mentioned in said Orders of June 6, 1941 and June 10, 1941, as to whether said Orders are valid, as to the jurisdiction of the Court herein over the assets in the hands of said states, state officials and state receivers, as to the jurisdiction of the Court to entertain the petition filed by the debtor herein, as to conflicts in the jurisdiction of the various states, state officials, state receivers and state courts with the jurisdiction of the court herein, and as to other matters, and said states, state officials and state receivers have not turned over the assets in their possession as ordered in said Orders.

5. That on July 9, 1941, an informal conference was called by this Court between the Trustee and its counsel and the persons referred to in said orders of June 6, 1941 and June



10, 1941, insofar as said persons could be identified at that time. Said conference was duly held in the courtroom of this Court at two o'clock in the afternoon on July 9, 1941, and was attended by the following, who noted their appearances thereat:

Hardie Scott, Harrisburg, Pennsylvania; Alexander N. Rubin, Philadelphia, Pennsylvania; Earl B. Swarner, Topeka, Kansas; R. H. Lauritzen, Madison, Wisconsin; H. Vernon Eney, Baltimore, Maryland; Guy B. Brown, Baltimore, Maryland; John H. Coppage, Baltimore, Maryland; J. Ross Crabbe, Columbus, Ohio; Dewey S. Godfrey, St. Louis, Missouri; W. F. Murrell, Jefferson City, Missouri; [fol. 197] R. K. Schurr, St. Louis, Missouri; Dale Dunifon, Columbus, Ohio; David M. Spriggs, Columbus, Ohio; John T. Jarecki, Springfield, *Chicago*; Chas. T. Houston, Nashville, Tennessee; W. F. Gray, Springfield, Illinois; Natt Tipton, Nashville, Tennessee; M. G. Robinson, Indianapolis, Indiana; Raymond Huwe, Cincinnati, Ohio; John J. Rivers, Cincinnati, Ohio; Fyke Farmer, Nashville, Tennessee; J. N. Reinhardt, Washington, D. C.; Ira J. Partlow, Charleston, West Virginia.

6. That conference was called for the purpose of discussing the various questions referred to in paragraph 4 hereof and said questions were fully discussed at said conference by all the parties above named, in an effort to arrive at a practical method of promoting cooperation between the parties in the administration of the estate of the debtor.

It was suggested at that conference that it is unnecessary at the present time to withdraw the property heretofore deposited by the debtor herein with state depositories in the various states in which the debtor's contracts were sold and that this proceeding can be conducted in an orderly fashion if said property is permitted temporarily to remain where it was physically located on June 6 and June 10, 1941, respectively, subject to the order of this court preventing and enjoining any act or conduct with respect thereto which would have the effect of altering the status which said property occupied on June 6, 1941. On that assumption said states state officials and state receivers expressed their willingness, pending the determination of the questions referred to in paragraph 4 hereof, to abide by said orders of June 6, 1941 and June 10, 1941, to the extent that said states state officials and state receivers will re-

frain from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any of the property now in their possession, control or custody, and said states state officials and state receivers agreed to accede to and carry out promptly any reasonable suggestions directed to them by said Trustee as to the liquidation, investment, reinvestment or other disposition of any such property now in their possession, control or custody, insofar as permitted by state law and the state courts, to the end that such assets may be preserved during the pendency of the proceedings herein and pending the determination of the legal questions referred to in paragraph 4 hereof. In view of this agreement by the said parties, your petitioner [fol. 198] submits that it is not necessary at the present time for the Court to determine the disputed questions raised by the aforesaid orders of June 6 and June 10, 1941.

7. That your petitioner, the Trustee herein, is of the belief that substantial economy in the administration of this estate may be accomplished if the aforesaid questions are not litigated at this time and that this objective can be accomplished without jeopardizing in any way the preservation of the assets of the estate herein and of the interests of the various parties interested therein, provided the orders of June 6 and June 10, 1941 remain in full force and effect, except insofar as said Orders provide for the surrender and delivery to the Trustee of assets in possession and control of said states, state officials or receivers, insofar as said orders provide for enjoining and restraining said states, state officials and state receivers from interfering with the exclusive possession and control of said Trustee over said assets, and insofar as said orders order and decree that any and all property theretofore placed in the possession, custody or control of any state official by the Fidelity Assurance Association, the Fidelity Investment Association or the Fidelity Investment Loan Association for the purpose of securing the creditors or contract holders of said Fidelity Assurance Association, Fidelity Investment Association or Fidelity Investment Loan Association against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other purpose, are adjudged for the purposes of said orders to be assets of the debtor herein and subject to said Orders, and provided that any modification of the order of this Court in the respects recommended herein continues in ef-

fect only until it appears necessary to determine the questions disposed of by said portions of said orders.

Wherefore, your petitioner respectfully prays the entry of an order on the form next hereto.

Respectfully, Central Trust Company. By Counsel:  
Townsend & Townsend.

Dated August 9, 1941.

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[fol. 199] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING ANSWERS—August 9, 1941

This day came Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation in and for the State of Iowa, and Guy R. Shaw, by their attorneys, Carl J. Stephens and Ben C. Buckingham, and presented their separate answers to the petition of the debtor filed herein on June 6, 1941, which answers are hereby ordered filed.

This order having been inadvertently omitted from the record on August 4, 1941, is entered nunc pro tunc.

Enter:

Ben Moore, District Judge.

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(The Answers, referred to in the foregoing order, are in the words and figures as follows:)

[fol. 200] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed August 9, 1941

To The Honorable Ben Moore, Judge Of The District Court Of The United States For The Southern District Of West Virginia:

Comes now Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation in and for the State of Iowa, in the above entitled matter, by his attorneys Carl J. Stephens and Ben C. Buckingham, and for

his answer to the petition of the debtor filed herein June 6, 1941, alleges as follows:

### First Defense.

In answer to debtor's petition Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation in and for the State of Iowa, denies each and every allegation of said petition, except as hereinafter admitted.

1. In answer to paragraph I of debtor's petition, Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation for the State of Iowa, alleges that said debtor on the date of said petition was in a state of dissolution in the State of West Virginia, the original domicile of said corporation, and was and is at present without license to do business of any nature whatever in the State of West Virginia; that said debtor was on the date of filing said petition and is presently without license to do business of any nature in the State of Iowa, and that said debtor does not exist as a corporation which may file a petition under Chapter X of the Bankruptcy Act.

[fol. 201] 2. In answering paragraph II of debtor's petition, Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation for the State of Iowa, alleges that said debtor was in a number of states in which it did business, licensed as an insurance company, in other states it was licensed as a building and loan association and was in the State of Iowa subject to statutory supervision and control in a manner similar to a foreign building and loan association, and that by reason of the charter of said debtor corporation, nature of its business, and nature of the licensing and control of said debtor in the states in which it operated, said debtor is entirely without the scope of Chapter X of the Bankruptcy Act.

3. In answering paragraph III of debtor's petition, Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation for the state of Iowa, admits that said debtor at the time of filing said petition was not licensed to sell investment or annuity contracts, and alleges that said debtor was, on the last date prior to the filing of said petition, when it had any corporate existence,



powers or license, licensed in the State of West Virginia, the state of its domicile, as a life insurance company.

4. In answering paragraph V of debtor's petition, Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation for the State of Iowa, alleges that debtor, prior to the filing of said petition, had been divested by reason of the operation of state laws in the states in which said debtor operated of substantially all its assets:

5. In answering paragraph VI of debtor's petition, Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation for the State of Iowa, admits the allegations relative to the appointment of receivers for debtor corporation in Kanawha County, West Virginia at the suit of Edgar B. Sims, Auditor of State of West Virginia and ex-officio Insurance Commissioner of the State of West Virginia; Chas. R. Fischer alleges that as Commissioner [fol. 202] of Insurance in and for the State of Iowa he has had custody and control of the assets of the debtor corporation for some years last past, and that as Permanent Receiver he took possession and control of said assets on the 19th day of May, A. D., 1941, and has proceeded, as Permanent Receiver, pursuant to the orders of the District Court, in and for Polk County, Iowa, and the statutes of the State of Iowa.

6. In answering paragraph VII of debtor's petition, Chas R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation for the State of Iowa, admits that said debtor corporation has outstanding certain investment and annuity contracts and admits that said debtor has been and will continue to be unable to meet its obligations as they mature, and alleges that such inability to meet its current obligations is due mainly to mismanagement and dissipation of its assets on the part of said debtor and/or its stockholders, officers and directors and its failure to comply with and meet the standards of state laws which were designed to safeguard the interests of purchasers of debtor's contracts; that said debtor has lost its license to do business in the State of Iowa, and that said debtor will be wholly unable to modify the contracts of said debtor held by residents of the State of Iowa, said contractholders being entitled to look to the deposits made by said debtor in the

State of Iowa in accordance with the statutes of the State of Iowa for the payment of the amounts due on said contracts without modification thereof.

7. In answering paragraph IX of debtor's petition, Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation for the State of Iowa, alleges that debtor is not a corporation which might lawfully form or effect a plan of reorganization under Chapter X of the Bankruptcy Act.

8. In answering paragraph X of debtor's petition, Chas. B. Fischer, Commissioner of Insurance and Permanent [fol. 203] Receiver for debtor corporation for the State of Iowa, alleges that no action on the part of the Board of Directors of debtor, or any other corporate action on the part of said debtor, could lawfully authorize the filing of a petition by said debtor under Chapter X of the Bankruptcy Act.

#### Second Defense

Further answering the petition of the debtor herein, and in addition to its foregoing admissions and denials of the allegations, Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation in and for the State of Iowa, alleges:

1. That the debtor corporation is not entitled to the relief demanded as against Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation for the State of Iowa, or anyone else similarly situated, for the reason that the securities (bonds) which have been deposited in Iowa for the protection of the contract purchasers of the debtor corporation are now under the custody and control of Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver of the debtor corporation, and the District Court in and for Polk County, Iowa, and are bearer bonds and have had their situs in the State of Iowa since said dates of their deposit, to-wit: January 16, 1929; April 14, 1936; November 2, 1938; that said bonds were deposited according to the statutes of the State of Iowa as contained in the 1927 and subsequent Codes of the State of Iowa; that said bonds have at all times been held by the State of Iowa in trust for the use and benefit of the contractholders (creditors); that the District Court, in and

for Polk County, Iowa, specifically found that the title to said securities vested in the State for the use and benefit of contract purchasers residing in the State of Iowa at the moment said securities were deposited in this state by said debtor corporation; that, therefore, title to said bonds was not in said debtor corporation at the time said debtor filed its petition for reorganization.

2. That said debtor's petition filed June 6, 1941, was not filed in good faith as required by Chapter X of the Bank-[fol. 204] ruptcy Act, in that among other things it is wholly unreasonable to expect that a plan of reorganization can be effected herein and in that prior proceedings are pending in the courts of the State of Iowa and in the courts of other states in which proceedings the interests of Iowa creditors and creditors resident in other states would be best subserved.

3. That the stockholders of debtor have no equity or interest whatever remaining in the business, property or assets of said debtor, the contractholders of said debtor constituting the only remaining interest in the business, property and assets of said debtor, and said stockholders have no legitimate interest whatever to be served by the maintenance of this proceeding and that the maintenance of this proceeding can result only to the detriment of the contract holders of debtor located in Iowa and elsewhere.

4. That the contract holders of said debtor located in Iowa are presently protected to the full extent of the value of the contracts held by them by funds deposited in Iowa by said debtor, title to which funds is now in Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver, and which funds will soon be ready for distribution to said Iowa contractholders.

5. That the petition herein was filed at the instance of persons who are in the position of mere interlopers and who have no interest whatever in the business, property or assets of said debtor and the filing of said petition constitutes an attempt to harass, hinder and delay the efforts of contractholders to realize the value of their contracts according to their rights under laws expressly adapted to such purpose, is in derogation of the very laws under which

debtor operated and obtained its business and revenues during its business career, and is a gross misuse and perversion of the jurisdiction granted to the courts by Chapter X of the Bankruptcy Act.

6. That to the knowledge of Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation for the State of Iowa, the contractholders of said debtor resident in Iowa are desirous that the funds [fol. 205] deposited by debtor in Iowa in trust for the benefit and security of Iowa contractholders should be liquidated and paid out and that a large number of contractholders have urgently requested that these funds be so paid out to them, and, in view of the history of said debtor in Iowa and its failure to meet its obligations, said contractholders are no longer willing to carry their contracts with said debtor either as presently constituted or upon any proposed reorganization, and said Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation for the State of Iowa, is informed and verily believes that said contractholders will not consent to any plan of reorganization whatever involving said debtor.

7. That an examination of the terms of the various contracts which debtor has outstanding which include provisions relative to cash value, paid up contract value, options, reserve funds, maturity and retirement funds, surplus participation, cash commuted value, insurance protection features, and many other diverse and complex provisions illustrates that insurmountable difficulties would be presented in attempting to modify all of the various classes of contracts outstanding and to secure the consent of the requisite number of contractholders thereof, and demonstrates conclusively that a reorganization of the debtor is not feasible.

8. That although all of the facts alleged in this answer were well known to the debtor at the time said petition was filed, and said debtor has for a period of some years been well aware that it would be unable to meet its contract obligations, yet said debtor has wholly failed to file or suggest any plan of reorganization up to the present time and has given no indication whatever as to when such a plan may be forthcoming, and that the failure of debtor in this re-



spect under the circumstances existent demonstrates conclusively its lack of good faith in the filing of said petition. [fol. 206] Wherefore, Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation for the State of Iowa, prays that the petition of said debtor be dismissed at debtor's costs.

Commissioner of Insurance and Permanent Receiver for the Debtor Corporation for State of Iowa, by (S.) Chas. R. Fischer, Commissioner and Permanent Receiver. (S.) Carl J. Stephens, (S.) Ben C. Buckingham, Attorneys for Permanent Receiver.

Dated this 1st day of August, 1941..

[fols. 207-214] *Duly sworn to by Chas. R. Fischer. Jurat omitted in printing.*

[fol. 215] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO VACATE OR RESCIND ORDER OF AUGUST 9, 1941, IN SO FAR AS SAME IS APPLICABLE TO INSURANCE COMMISSIONER OF MARYLAND—Filed September 12, 1941

Now comes John B. Gontrum, Insurance Commissioner of the State of Maryland, appearing specially and for the sole purpose of prosecuting this Motion, and moves this Honorable Court to vacate or rescind its order entered herein on August 9, 1941, in so far as the same purports to enjoin and restrain this Movant from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting any of the securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor. And for cause of his said motion, this Movant says that this Honorable Court is without jurisdiction to enjoin and restrain this Movant from selling, assigning, concealing, encumbering, transferring or otherwise disposing of or affecting the securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor, because:

1. The securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor were so assigned and deposited in accordance with the laws of the State of Maryland, Sections 218 to 234, inclusive, of Article 48A of the Code of Public General Laws of Maryland, and the said securities are now, under the laws of the State of Maryland, in the custody and possession of, and title thereto is now vested in this Movant as Insurance Commissioner of the State of Maryland. As Insurance Commissioner of the State of Maryland this Movant is the mere agent of the State of Maryland and in his capacity as such, is beyond the reach of the judicial power of this Honorable Court. The State of . . . Maryland has not [fol. 216] given its consent to a suit, injunction or other judicial proceeding against this Movant as Insurance Commissioner of the State of Maryland, and the order of this Honorable Court entered herein on August 9, 1941, in so far as it is directed against and purports to enjoin and restrain this Movant as Insurance Commissioner of the State of Maryland, is, therefore, void under the Eleventh Amendment to the Constitution of the United States.

2. The laws of the State of Maryland, Sections 218 to 234, inclusive, of Article 48A of the Code of Public General Laws of Maryland under which the Debtor was required to and did assign to and deposit with the Insurance Commissioner of the State of Maryland the securities now held by this Movant, were enacted by the State of Maryland for the better protection of its citizens in the exercise of the powers reserved to it as a sovereign state by the Tenth Amendment to the Constitution of the United States, and said laws of the State of Maryland provide a complete and comprehensive plan or method for liquidating said securities and distributing the proceeds thereof among the persons entitled thereto under the laws of the State of Maryland. The Bankruptcy Laws of the United States cannot and do not infringe upon, supersede or abrogate such laws of the State of Maryland and; therefore, this Honorable Court has no jurisdiction under any supposed authority conferred by the Bankruptcy Act to enjoin and restrain this Movant as Insurance Commissioner of the State of Maryland from disposing of such securities and distributing the proceeds thereof in accordance with the laws of the State of Maryland.

3. The securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor do not constitute property of the Debtor within the meaning of Chapter 10 of the Bankruptcy Act so as to give this Honorable Court jurisdiction over such securities.

4. It does not appear from the petition filed herein by the Central Trust Company, Trustee, upon which the said order of August 9, 1941, was entered, that the Debtor has any equity in the said securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor, or that the present value of said securities is in excess of the obligations of the Debtor on contracts heretofore sold, negotiated, issued or accrued in the State of Maryland, and, therefore, the said securities [fol. 217] do not constitute property of the Debtor within the meaning of Chapter 10 of the Bankruptcy Act so as to give this Honorable Court jurisdiction over such securities.

5. This Movant is informed and believes that the Debtor has no equity in the said securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor, and is informed and believes that the present value of said securities is less than the obligations of the Debtor on contracts heretofore sold, negotiated, issued or accrued in the State of Maryland; and, therefore, the said securities do not constitute property of the Debtor within the meaning of Chapter 10 of the Bankruptcy Act so as to give this Honorable Court jurisdiction thereover.

6. The securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor were, in accordance with the laws of the State of Maryland, so assigned and deposited and are now held by this Movant in trust as security for all the holders of contracts or other obligations of the Debtor sold, negotiated, issued or accrued in the State of Maryland, and title to said securities, as well as custody and possession thereof are now in this Movant and not in the Debtor. The said securities, therefore, do not constitute property of the Debtor within the meaning of Chapter 10 of the Bankruptcy Act so as to give this Honorable Court exclusive jurisdiction thereover.

7. The securities heretofore assigned to and deposited with the Insurance Commissioner of the State of Maryland by the Debtor, and now held by this Movant as such Insurance Commissioner, were so assigned and deposited in accordance with the laws of the State of Maryland, Sections 218 to 234 of Article 48A of the Code of Public General Laws of Maryland, which provide that said securities should be held by said Insurance Commissioner of the State of Maryland in trust as security for all the holders of contracts of the Debtor sold, negotiated, issued or accrued in the State of Maryland. The assignment and deposit of said securities in accordance with the said laws of the State of Maryland constitute a contract in the public authority within the meaning of Chapter 10 of the Bankruptcy Act, and this Honorable . . . Court is without jurisdiction [fols. 218-220] to reject, alter, modify or abrogate said contract.

(S.) H. Vernon Eney, Guy B. Brown, Attorneys for John B. Gontrum, Insurance Commissioner of the State of Maryland, Appearing Specially and for the Sole Purpose of Prosecuting This Motion.

*Duly sworn to by John B. Gontrum. Jurat omitted in printing.*

[fol. 221] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO AMEND ANSWER—Filed September 15, 1941

Come now the intervenors, Edgar B. Sims, Auditor of the State of West Virginia and ex-officio Insurance Commissioner of the State of West Virginia, and H. Isaiah Smith and Ross B. Thomas, State Court Receivers, by counsel, and move the Court that they be permitted to amend the answer filed by the former and adopted by the latter on page 3 thereof, and Paragraph II, so as to read as follows: "Respondent denies that the debtor is a corporation which could be adjudged a bankrupt under the Federal Bankruptcy Act, and upon information and belief denies that it is not an insurance corporation, and respondent therefore alleges debtor is not authorized to file a petition under the



provisions of the Bankruptcy Act.", in the place of said Paragraph II set out in said answer.

Edgar B. Sims, Auditor of the State of West Virginia and Ex-officio Insurance Commissioner of the State of West Virginia, by (S.) Clarence W. Meadows, by J. C. P., III, Clarence W. Meadows, Attorney General; H. Isaiah Smith and Ross B. Thomas, State Court Receivers, by (S.) J. Campbell Palmer, III, Koontz & Koontz, Their Counsel.

September 15, 1941.

[fols. 222-223] IN UNITED STATES DISTRICT COURT

[Title omitted]

CONSENT OF DEBTOR TO AMENDMENT OF ANSWER—Filed  
September 15, 1941

James R. Fleming, counsel for the debtor, Fidelity Assurance Association, upon being requested so to do by attorneys for Edgar B. Sims, Auditor of the State of West Virginia and ex-officio Insurance Commissioner of the State of West Virginia, and H. Isaiah Smith and Ross B. Thomas, State Court Receivers, hereby consents, in writing, in accordance with Rule 15(a) of the Rules of Civil Procedure, to the amendment of Paragraph II, page 3, of the answer filed and adopted by said above mentioned parties, as set out in their written motion of September 15, 1941.

(S.) James R. Fleming, Attorney for Debtor.

September —, 1941.

[fol. 224] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF L. H. BROOKS, TRUSTEE, FREDERIC LEAKE, AND A. L. GOLDBERG, JR., TRUSTEE, TO VACATE OR RESCIND ORDER OF AUGUST 9, 1941, IN SO FAR AS SAME IS APPLICABLE TO PROCEEDINGS IN TENNESSEE STATE COURT—Filed September 15, 1941

Come L. H. Brooks, Trustee, Frederic Leake, and A. L. Goldberg, Jr., Trustee, appearing specially and for the sole purpose of prosecuting this motion, and move to va-

cate or rescind the order entered August 9, 1941, in so far as same purports to enjoin and restrain these movants from continuing the proceedings in the Chancery Court of Davidson County to enforce the trust in favor of the holders of investment contracts sold by debtor in the State of Tennessee in and to the deposit of securities in the hands of the State Treasurer of Tennessee. For grounds of their said motion movants refer to the certified transcript of the record of said proceedings attached as an exhibit to their answer to debtor's petition and filed as a part of the record in this case, as well as the undisputed facts appearing in [fol. 225] the pleadings and record in the case, and say:

(1) The undisputed facts show that debtor's petition for reorganization, including the application for injunction, was not filed in good faith in that there is no reasonable prospect of a fair, equitable and feasible plan of reorganization of debtor.

(2) The claims of contract holders in Tennessee entitled to the benefit of a deposit of securities in that State are in excess of the amount of the deposit and whether or not a plan of reorganization is ever presented or confirmed, there is no equity in said deposit for debtor or for the Trustee.

(3) The deposit of securities by the debtor in the State of Tennessee was made pursuant to a State statute which required said deposit as a condition to the doing of business in that State by the company and which further prohibits said deposit from being released or returned until the discharge in full of all liabilities of the company on all investment contracts sold in the State of Tennessee and for which such deposit is maintained and an injunction of this Honorable Court in this proceeding staying the enforcement of the rights of the Tennessee contract holders through proceedings instituted in the Courts of that State is contrary to the Tenth and Eleventh Amendments to the Constitution of the United States.

(4) No necessity for a stay of the prosecution of the judicial proceedings in the Courts of Tennessee for the sub-[fols. 226-228]. jection of the deposit in that State to the claims of contract holders entitled to the benefit of the deposit because no plan of reorganization of debtor could

deprive the contract holders entitled to the benefit of the deposit in Tennessee of the option of obtaining cash payment of the liability of the debtor in cash out of said deposited securities.

Wherefore, Movants Pray:

(1) That the order of August 9, 1941, be modified so as to permit the proceedings in the Chancery Court of Davidson County, Tennessee for the subjection of the securities deposited in that State to the claims of contract holders entitled to the benefit of the deposit to be proceeded with and to permit the State Court in that proceeding to determine the rights and interests of said claimants in said deposited securities.

(2) That the Trustee herein be ordered and directed to furnish for use in said proceedings in the State Courts of Tennessee all information and records of the debtor that may be necessary for the determination of the relative rights of the contract holders in said deposited securities in Tennessee.

(S.) Fyke Farmer, Attorneys for L. H. Brooks,  
Trustee, Frederick Leake, and A. L. Goldberg, Jr.,  
Trustee.

[fol. 229] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF D. C. RIVERS, ET AL., TO FILE INTERVENING CROSS PETITION SEEKING REORGANIZATION—Filed nunc pro tunc as of August 26, 1941

To the Honorable Ben Moore, Judge of the District Court of the United States for the Southern District of West Virginia:

Now comes D. C. Rivers, Pauline Rivers, etc. (See page 1 of cross petition) and move for leave to intervene with a cross petition in this proceeding, for themselves individually and as members of the Ohio-Indiana and Kentucky creditors committee and as such committee, and on behalf of all other persons similarly situated contract holder creditors of the Fidelity Assurance Association, in order to

assert their right to Chapter X, Section 126, to seek a Reorganization of the debtor corporation through their proposed cross petition, of which a copy is hereto attached and made a part hereof upon the grounds:

1. Set forth on Pages 2, 3, 4, 5, 11 and 12 of the attached proposed cross petition, particularly those stated on the bottom of page 3 and top of page 4 and all of pages 11 and 12;

2. That the hearings provided in Chapter X, Sections 144 and 161, of the Bankruptcy Act are not completed and are pending, and Section 145 provides for filing an answer [fol. 230] after completion of the hearing in Section 144, and therefore a cross petition seeking the Reorganization can be filed within the same period;

3. That a cross petition seeking Reorganization can be filed any time prior to dismissal of the original petition or prior to "an order which has become final approving a petition;" as described in Section 149 of the Act;

4. That the filing of this cross petition will not unduly delay or prejudice the adjudication of the rights of the original parties herein, the debtor, certain creditors and State officials and state court receivers for the reason that the provisions of Section 145 of the Act would justify the Court in refusing to hear evidence upon any issues established by the cross petition which have already been tried and determined, and for the further reason that a plan of Reorganization will not completely have been voted upon by creditors before the statutory time periods provided in Sections 144 and 161 have expired;

5. Congress intended to provide a group of three (3) or more creditors with claims in the aggregate of \$5,000 or more, with the remedies of a cross petition to exercise their right created in Section 126 to seek a Reorganization;

6. The application of the principals of equity to the circumstances of this particular case provide creditors with a right to intervene by cross petition to seek a Reorganization.

(S.) Raymond Huwe, 1016 1st Nat'l Bank Bldg., Cincinnati, Ohio. (S.) John J. Rivers, 711 Traction Bldg., Cincinnati, Ohio, Attorneys for D. C. Rivers, et al., Cross Petitioners.



[fol. 231] IN UNITED STATES DISTRICT COURT

[Title omitted]

CROSS-PETITION OF D. C. RIVERS, ET AL., INDIVIDUALLY, AND  
THE OHIO, INDIANA, AND KENTUCKY CREDITORS COMMITTEE  
SEEKING REORGANIZATION OF DEBTOR

To the Honorable Ben Moore, Judge of the District Court  
of the United States for the Southern District of West  
Virginia:

Now come D. C. Rivers, Pauline Rivers, R. A. McDowell,  
Arthur C. Burroway, W. Frank Armstrong, William G.  
Werner, Trustee for Margaret Ann Werner and William  
Thomas Werner, James E. Traquair, Bela Klein, and Harry  
J. Gilligan, Trustee for John J. Gilligan, Jeanne Gilligan,  
Frank J. Gilligan, and Harry J. Gilligan, Jr., Cincinnati,  
Hamilton County, Ohio, Edward F. Wiederhold, Jr., Lebanon,  
Warren County, Ohio, Carl H. Krippendorf, Perintown,  
Clermont County, Ohio, Parke G. Smith, Amberly  
Village, Hamilton County, Ohio, John J. Rivers, St. Bernard,  
Hamilton County, Ohio, and Merlin R. Granger, Cincinnati,  
Hamilton County, Ohio, and Indianapolis, Marion  
County, Indiana, on behalf of themselves individually and  
[fol. 232] all other persons similarly situated, contract  
holders and creditors of The Fidelity Assurance Association,  
formerly The Fidelity Investment Association, and on  
behalf of the Ohio, Indiana, and Kentucky Fidelity Assurance  
Association creditors committee, Cincinnati, Ohio, of  
more than twelve contract holder creditors, and all other  
persons similarly situated, who may come in and seek relief  
herein and say:

They are the owners of cash surrender liability claims  
against the debtor which are more than \$5,000.00 in aggregate  
and which claims are liquidated as to amount and not  
contingent as to liability and are stipulated in the cash  
surrender schedules of their respective contracts;

That the questions which are the subject matter of these  
proceedings for corporate reorganization of The Fidelity  
Assurance Association are of common and general interest  
to all contract holders of the debtor, irrespective of what  
states they are residents and of what deposits are held in  
the respective states in which they reside;

• That these cross-petitioners are informed and believe that all of the contract holders and creditors of the debtor are persons constituting a class so numerous as to make it impracticable to bring them all before this court, and these cross-petitioners will fairly insure the adequate representation of all similarly situated persons because the character of the right sought to be enforced for or against this class is

1) Several, and the object of the action is adjudication of claims which may affect specific property involved in [fol. 233] this action, and upon which all of these persons have a claim as cestui qui trust beneficiaries and a lien; and

2) Several, and there are common questions of law and fact affecting the several rights, and a common relief is sought, as provided in Rule 23 of the Federal Rules of Civil Procedure.

These cross-petitioners further state that no other creditors have filed in this proceeding any pleading on behalf of the creditors of the debtor which seeks the reorganization of the debtor by this court and which joins in the prayer of the debtor for reorganization of the debtor.

These cross-petitioners further state

1. That a statute of the United States, to-wit: Section 126 of Chapter X of the Bankruptcy Act (Chandler Act) as amended August 22, 1940, confers upon them an unconditional right to intervene in this proceeding to file a cross-petition seeking the reorganization of the debtor; that said Section of Chapter X does not preclude three or more creditors having claims in the aggregate of \$5,000.00 or over from filing a cross-petition seeking a reorganization of the debtor; that Section 137 of the Act provides only for an answer of creditors which controverts and denies the allegations of the original petition and does not provide for a pleading by the creditors joining in the prayer of the petition; that Section 126 of the Act permitting a petition by the required number of creditors, "if no other petition by or against such corporation is pending under this Chapter file a petition under this Chapter" does not preclude these cross-petition creditors from filing a cross-petition under this Chapter joining in the prayer of the [fol. 234] petition; that in the event the original petition

in this pending reorganization proceeding is dismissed for lack of legal capacity of the debtor to file such a petition (more fully set forth in Part VII hereinafter in this cross-petition) these cross-petitioning creditors, if the right to intervene in this proceeding to file a cross-petition is denied, will be required to file a separate petition for reorganization after the present reorganization proceeding ceases to be pending to the prejudice of the debtor, stockholders and creditors of the debtor by reason of a succession of suits for reorganization;

2. That the representation by existing parties to this proceeding of their interest and the interest of all others similarly situated is inadequate as far as the pleadings filed in this matter are concerned in that no other creditors have requested that the debtor be reorganized and join in the prayer of the debtor for reorganization, and the interest of these cross-petitioning creditors and the interest of all others similarly situated is, or may be, bound by a judgment in this action.

These cross-petitioners further state that the above circumstances provide them with the power to intervene in this proceeding as a matter of right, pursuant to Rule 24 (a) of the Federal Rules of Civil Procedure.

In the alternative these cross-petitioners state that if the statutes of the United States, Section 126 of Chapter X of the Bankruptcy Act (Chandler Act) as amended August 22, 1940, do not confer an unconditional right to intervene, they confer a conditional right to intervene under the conditions described as appertaining to Rule 23 and Rule 24 [fol. 235] (b) hereinbefore stated, and further state that their claims and cross-petition have questions of law and fact in common with the main action in this proceeding and state that their intervention by cross-petition will not unduly delay or prejudice the adjudication of the rights of the original parties herein, as required in Rule 24(b).

These cross-petitioning contract holder creditors respectfully represent:

# I

That the Fidelity Assurance Association, known prior to January 1, 1941, as The Fidelity Investment Association, is unable to qualify under the Investment Companies Act of 1940 to conduct new business and is insolvent according to market valuations of its assets.

## II

Said debtor is a corporation organized under the laws of the State of West Virginia and existed as a bond investment company selling installment face amount certificates, installment annuities and installment saving contracts to the public until December 31, 1940, and was licensed but failed to qualify and operate as an insurance company under the laws of West Virginia until March 31, 1941, and is a corporation which could become bankrupt under Section 4, Act of Congress, relating to bankruptcy, and is not a municipal, insurance, banking nor railroad corporation, nor a building association.

Said debtor now has, and for a longer portion of the six months next preceding the filing of the original petition [fol. 236] and this cross-petition has had, its principal assets in the control of the West Virginia State Treasurer and/or the West Virginia Auditor and Ex-Officio Insurance Commissioner at Charleston, West Virginia, within the territorial jurisdiction of this court, than in any other judicial district.

These cross-petitioners aver that the interests of the debtor in the securities deposited in said judicial district are of an equitable nature and are and were located in said city and district by reason of the fact that the legal title holder of said securities and the trustee of said securities for the primary benefit of all cestui qui trust contract holders wherever residing and for the secondary and resulting trust benefit of the debtor is personally within said city and district, and that said legal title holder and trustee placed said securities, 95% endorsed to bearer, in the vaults of the Kanawha Valley Bank located in Charleston, West Virginia in said judicial district.

These cross-petitioners further aver that under the provisions of Section 3448 (3) of Michie's Code of West Virginia laws the Treasurer of West Virginia and/or Auditor and Ex-Officio Insurance Commissioner of West Virginia is or are trustee or trustees of said securities, 95% of which are endorsed to bearer, for the benefit of all contract holders of the Special Income, Special Annuity, Special Annuity Matured and Retired, Series A, Series A Matured and Retired, Series B, Series B Matured and Retired, Series C, Series D, and Series D Matured and Retired funds of the debtor and that debtor's resulting and secondary



[fol. 237] equity trust interests in said assets have existed within the above named judicial district and that said interests are its principal assets.

### III

The nature of the business of said debtor is the sale of installment face amount certificates, installment annuities and installment saving contracts to the public either directly or through a subsidiary and the investment of the installment cash payments of contract holders of many states of the United States in securities.

### IV

1. The assets and liabilities of said debtor are set forth in "Exhibit A" of the original petition of said debtor. These cross-petitioners incorporate said Exhibit A by reference and make said Exhibit A of the original petition filed June 6, 1941, by the debtor, a part hereof for the purpose of stating the assets and liabilities as of October 31, 1940. These cross-petitioners further state that the assets and liabilities of the debtor are more recently compiled by The Central Trust Company of Charleston, West Virginia, the duly appointed and qualified trustee in this proceeding, and that parts A to M inclusive of its report filed with the Court on August 5, 1941, are likewise incorporated herein by reference and made a part hereof for the purpose of showing the assets and liabilities of the debtor as of June 6, 1941.

[fol. 238] 2. The issued and outstanding stock of the debtor is set forth in Part IV of the debtor's original petition filed on June 6, 1941. These cross-petitioners adopt in full said Part IV of the debtor's original petition and incorporate it as their statement of the facts relating to the issued and outstanding stock of the debtor and make it a part hereof, the same as if reiterated and rewritten herein.

3. The financial condition of the said debtor is that the market values of its assets are not equal to its liabilities. There is pending in the State of West Virginia a receivership suit filed by the Auditor and Ex-Officio Insurance Commissioner of West Virginia based upon the failure of the debtor's assets to equal its liabilities. There are pending in other states not less than fifteen separate ancillary re-

ceivership proceedings, including that of Wisconsin wherein over \$1,000,000 market value of securities of a deposit by debtor of securities of the approximate market value of \$2,500,000 have already been converted by the Wisconsin Banking Commission into cash in preparation for distribution to Wisconsin contract holders, and including proceedings in several other states wherein the duly qualified and appointed receivers were preparing to likewise sell securities belonging to the contract holders of the debtor of ten separate trust funds, described in Part III hereinbefore, in which the contract holders of the debtor have an interest.

## V

The nature of all pending proceedings affecting the property of said debtor known to your cross-petitioners and the [fol. 239] Courts in which they are pending, is set forth in the last paragraph of Part IV hereof and in Part XII hereof.

## VI

No plan of reorganization, readjustment or liquidation affecting the property of said debtor is pending either in connection with or without any judicial proceeding.

## VII

The specific facts showing the need for relief under Chapter X of said Act are as follows:

1. The earnings from investments of said debtor required by the laws and rules and regulations of officials of various states in recent years have been insufficient, and the prospective earnings in future years at present appear to be insufficient to enable it to meet its liabilities under its contracts executed with its contract holders;

2. The assets in which the debtor has an interest, to-wit: industrial, financial, railroad, public utility, federal farm loan, municipal, U. S. Government, foreign governmental, foreign corporation, and real estate bonds and mortgage notes and domestic corporation preferred stocks, are of substantial value and will mature in the future at a higher value than their present market values, which on June 6, 1941 approximated \$23,640,000. These assets, if preserved and not liquidated or sold at this time, will have a much greater value as assets of a reorganized going concern and

will provide the contract holding creditors of the debtor, if the debtor is reorganized, with a much greater return [fol. 240] to them of their investment and money than if presently liquidated and if hereafter valued upon the current standards established by the National Association of Insurance Commissioners or by the Board of Governors of the Federal Reserve Banking System;

3. The debtor has not qualified to do business under the Investment Company Act of 1940;

4. The debtor is in need of reorganization for the above reasons and cannot successfully effect a reorganization unless under a judicial proceeding in a court with nationwide jurisdiction.

5. The proposed reorganization by the West Virginia Auditor and Ex-Officio Insurance Commissioner under the West Virginia, Kanawha Circuit Court, became ineffective when that Court's jurisdiction did not include jurisdiction over the officials in fifteen different states holding deposits of the debtor and who could not be enjoined from selling securities deposited by the debtor in which the contract holders had an interest. The only judicial proceeding in which the debtor can be effectively reorganized, in view of the above facts, is the Federal Court with nation-wide jurisdiction to prevent any acts prejudicial to the interest of the contract holders in the debtor's deposits in West Virginia and in all other states.

6. The debtor's good faith and legal capacity to file a petition for reorganization under Chapter X of this Act has been questioned because of the alleged illegal and defective Board of Directors meeting which authorized debtor [fol. 241] company, be resolution, to file said petition. Questions have been raised as to

a) The insufficiency of the contents of the notice of the directors meeting of June 3, 1941;

b) The improper notice of the change of meeting place from Wheeling to Pittsburgh;

c) The incapacity of certain directors who voted on said resolution to serve as directors in view of the injunction proceedings against debtor in Detroit, Michigan, in December, 1938, and the inability of these directors to obtain

exemption from the application of certain rules and regulations of the S. E. C. and provisions of the Investment Company Act of 1940;

d) The legality of the quorum in existence at the time of the resolution at the meeting of June 3, 1941, with reference to the application of the by-laws of the debtor to said quorum.

If the debtor is found by this Court not to have legal capacity to file said petition under Chapter X of said Act, then this petition and this proceeding in reorganization may be dismissed and the administration of the debtor's assets will be returned to the West Virginia, Kanawha Circuit Court, and the fifteen other state courts in which receiverships are pending to the prejudice of the contract holders with beneficial interest in the ten separate trust funds of the debtor.

The other alternative to the last above mentioned situation would be a creditors' petition under Section 126 of said Act to be filed immediately after the dismissal of this pending reorganization proceeding. All of the evidence and [fol. 242] hearings upon motions, pleadings, etc. of this pending reorganization proceeding and all of the trustees' reports herein, would be of no avail in a subsequent proceeding by creditors after the dismissal of this proceeding. There would be duplication in costs and loss of valuable time, to the prejudice of the contract holder creditors.

For the above stated reasons these cross-petitioners file this cross-petition under Section 126 of Chapter X of said Act for the purposes of avoiding liquidation by fifteen different state ancillary receivers and of eliminating the necessity of a creditors' petition after this pending reorganization proceeding is dismissed because of the lack of legal capacity of the debtor to file a petition by reason of any alleged defects of the meeting of June 3, 1941. The interest of said debtor and its contract holders will be best preserved by the continuance of its business as a going concern under a plan of reorganization which can be accomplished under the provisions of Chapter X of said Act.

7. The specific facts showing why adequate relief cannot be obtained under Chapter XI of said Act are as follows:

The capital structure of said debtor must be revised and the interest payments of the contracts of said debtor must



be adjusted and reduced and contractual reserve provisions revised.

### VIII

Your cross-petitioners desire that a plan of reorganization be effected for said debtor under and pursuant to Chapter X of said Act.

[fol. 243] The Investors Syndicate, a Minnesota corporation, and a competitor of the debtor, has qualified under the provisions of the Investment Company Act of 1940 and the wholly owned subsidiary of the debtor, Fidel Association of New York, incorporated, has always met the stringent requirements of the laws of New York and Connecticut and the regulatory control of their state officials, and these cross-petitioners believe that a plan of reorganization is reasonable which may be similar to the organization of any competitor now qualifying and operating under provisions of the Investment Company Act of 1940.

### IX

The indebtedness of said debtor, liquidated as to amount and not contingent as to liability, is over \$250,000.

### X

No other reorganization proceeding is pending against said debtor under Chapter X of said Act except this proceeding in which this cross-petition is filed, nor is any other bankruptcy proceeding, initiated by a petition, by or against said debtor now pending.

### XI

Your cross-petitioners are contract holder creditors of said debtor and have claims against it and against its securities and property, liquidated as to amount and not contingent as to liability by reason of their cash surrender liability claims, stipulated by the terms of their contracts [fol. 244] with the debtor, amounting in the aggregate to over \$5,000, in fact in the exact total amount of \$10,069.15.

The nature and amount of cross-petitioners' claims, for the purposes of this cross-petition, are as follows:

(1) The claim of cross-petitioners, D. C. Rivers and/or Pauline Rivers is for the sum of \$1407.50. The said cross-petitioners are the owners of a Series D contract of the

debtor, No. 35-5V175, registered June 11, 1937, and the cash surrender liability claim of said cross-petitioners is stipulated by said contract to be \$1407.50 or more.

(2) The claim of cross-petitioner, R. A. McDowell, is for the sum of \$348.00. The said cross-petitioner is the owner of a Series D contract of the debtor, No. 35-5S4411, registered September, 1938, and the cash surrender liability claim of said cross-petitioner is stipulated by said contract to be \$348.00 or more.

(3) The claim of cross-petitioner, Arthur C. Burroway, is for the sum of \$181.50. The said cross-petitioner is the owner of a Series D contract of the debtor, No. 35-5R-5988, registered July 19, 1938, and the cash surrender liability claim of said cross-petitioner is stipulated by said contract to be \$181.50 or more.

(4) The claim of cross-petitioner W. Frank Armstrong, is for the sum of \$645.00. The said cross-petitioner is the owner of a Series D contract of the debtor, No. 35-5S-740, registered October, 1936, and the cash surrender liability claim of said cross-petitioner is stipulated by said contract to be \$645.00 or more.

(5) The claim of cross-petitioner Edward F. Wiederhold, Jr., is for the sum of \$69.00. The said cross-petitioner is the owner of a Series D contract of the debtor, No. 35-R-7328, registered November 25, 1938, and the cash surrender liability claim of said cross-petitioner is stipulated by said contract to be \$69.00 or more.

[fol. 245] (6) The claim of cross-petitioner, Carl H. Krippendorf, is for the sum of \$720.00. The said cross-petitioner is the owner of a Series D contract of the debtor, No. 35-5U-745, registered August 18, 1938, and the cash surrender liability claim of said cross-petitioner is stipulated by said contract to be \$720.00 or more.

(7) The claim of cross-petitioner, Carl H. Krippendorf, is for the sum of \$720.00. The said cross-petitioner is the owner of a Series D contract of the debtor, No. 35-5U-746, registered August 18, 1938, and the cash surrender liability claim of said cross-petitioner is stipulated by said contract to be \$720.00 or more.

(8) The claim of cross-petitioners, William G. Werner, and/or Margaret B. Werner, Trustees for Margaret Ann

Werner and Wm. Thomas Werner, is for the sum of \$2195.00. The said cross-petitioners are the owners of a Series D contract of the debtor, No. 35-5W-126, registered October 26, 1938, and the cash surrender liability claim of said cross-petitioners is stipulated by said contract to be \$2195.00 or more.

(9) The claim of cross-petitioners, James E. Traquair and/or Betty O. Traquair, is for the sum of \$159.00. The said cross-petitioners are the owners of a Series D contract of the debtor, No. 35-5R-6682, registered October 1, 1938, and the cash surrender liability claim of said cross-petitioners is stipulated by said contract to be \$159.00 or more.

(10) The claim of cross-petitioner, John J. Rivers, is for the sum of \$266.00. The said cross-petitioner is the owner of a Series D contract of the debtor, No. 35-5R-1228, registered November 20, 1936, and the cash surrender liability claim of said cross-petitioner is stipulated by said contract to be \$266.00 or more.

(11) The claim of cross-petitioner, Merlin R. Granger, is for the sum of \$810.00. The said cross-petitioner is the owner of a Series D contract of the debtor, No. 35-5S-798, registered October 20, 1936, and the cash surrender liability claim of said cross-petitioner is stipulated by said contract to be \$810.00 or more.

(12) The claim of cross-petitioner, Merlin R. Granger, is for the sum of \$458.50. The said cross-petitioner is the owner of a Series B contract of the debtor, No. 34-S-13649, registered November 10, 1937, and the cash surrender [fol. 246] liability claim of said cross-petitioner is stipulated by said contract to be \$458.50 or more.

(13) The claim of cross-petitioner, Merlin R. Granger, is for the sum of \$131.00. The said cross-petitioner is the owner of a Series B contract of the debtor, No. 34-S-22807, registered October 6, 1939, and the cash surrender liability claim of said cross-petitioner is stipulated by said contract to be \$131.00 or more.

(14) The claim of cross-petitioner, Merlin R. Granger, is for the sum of \$652.00. The said cross-petitioner is the owner of a Series D contract of the debtor, No. 35-5S-5292, registered August 1, 1939, and the cash surrender liability

claim of said cross-petitioner is stipulated by said contract to be \$652.00 or more.

(15) The claim of cross-petitioner, Parke G. Smith, is for the sum of \$375.00. The said cross-petitioner is the owner of a Series D contract of the debtor, No. 34S-17074, registered in the year 1938, (May 21st) and the cash surrender liability claim of said cross-petitioner is stipulated by said contract to be \$375.00 or more.

(16) The claim of cross-petitioners, Bela Klein and/or Corrine Klein, is for the sum of \$51.65. The said cross-petitioners are the owners of a Series D contract of the debtor, No. 35-5R-7240, registered November, 1938, and the cash surrender liability claim of said cross-petitioners is stipulated by said contract to be \$51.65 or more.

(17) The claim of cross-petitioners, Harry J. Gilligan and/or Blanche J. Gilligan, Trustees for John J. Gilligan, Jeanne Gilligan, Frank J. Gilligan and Harry J. Gilligan, Jr. is for the sum of \$880.00. The said cross-petitioners are the owners of a Series D contract of the debtor, No. 35-5U-779, registered October 8, 1938, and the cash surrender liability claim of said cross-petitioners is stipulated by said contract to be \$880.00 or more.

## XII

On April 11, 1941, H. Isaiah Smith and Ross B. Thomas of Charleston, West Virginia, were appointed West Virginia, Kanawha Circuit Court, receivers for the greater portion [fol. 247] of the interest of said debtor in its securities and assets wherever situated. This was a proceeding in equity brought by Edgar B. Sims, Auditor of West Virginia and Ex-Officio Insurance Commissioner of West Virginia in the case entitled "Edgar B. Sims, Auditor of the State of West Virginia and Ex-Officio Insurance Commissioner of the State of West Virginia vs. Fidelity Assurance Association," No. 16724. Within two weeks thereafter, ancillary receivership proceedings in equity were brought and are pending against said debtor in fifteen states wherein debtor had made deposits of securities belonging to these cross-petitioning contract holders and all other contract holders of the debtor as parts of ten separate trust funds in which they have a beneficial interest.



Wherefore, your cross-petitioners pray:

a) That an order be entered herein permitting the filing of this cross-petition as a matter of absolute right;

b) That an order be entered herein permitting the filing of this cross-petition without further and additional deposit of costs, as an exception to the provisions of Section 132 of Chapter X of said Act; one deposit having been made;

c) That service of this cross-petition with a subpoena for the debtor may be made upon said debtor as provided in the Act of Congress relating to bankruptcy;

d) That an order be entered herein approving this cross-petition;

e) That the Trustee hereinbefore appointed in this proceeding be continued as Trustee with powers as provided by Chapter X of said Act;

[fol. 248] f) That a date be set by the Court not less than thirty days nor more than sixty days from the date of filing of this cross-petition for a hearing thereon as provided by Section 161 of Chapter X of said Act;

g) That the Court determine that the West Virginia laws established a basic and fundamental trust for the benefit of contract holders everywhere and that the laws of other states where the debtor also deposited securities, and filed in West Virginia in lieu of securities a certificate of such other state deposit, established a trust or a lien superimposed upon the basic West Virginia trust for the benefit of resident contract holder creditors of those other states.

h) That the Court determine that the course of conduct and operations of the debtor from the very first contact with the contract holder creditor established a trust relationship.

i) That the Court classify contract holder creditors:

1) Upon the basis of ten separate trust funds, to-wit: Special Income, Special Annuity, Special Annuity Matured and Retired, Series A, Series A Matured and Retired, Series B, Series B Matured and Retired, Series C, Series D, and Series D Matured and Retired.

2) And then further classify each of the above ten into those fully secured, those partially secured and those unsecured by the deposits of debtor within the states in which they reside.

j) That the Court order the duly qualified and acting Trustee in Reorganization not to change the total value of [fol. 249] the securities deposited in states other than West Virginia but to substitute securities therein by placing in each state securities belonging to the several funds against which residents of such state have cash surrender liability claims sufficient in value to approximately equal the portion of each separate fund's cash surrender liability claims of residents in the state bears to the total cash surrender liability claims of residents in the state, providing, however, that the character of the substitute securities meets with the requirements of the particular states' laws, rules and regulations.

k) That the Court order the duly qualified and acting Trustee in Reorganization to provide a plan of reorganization which includes

1) The debtor first meeting the requirements of the deposit laws, rules and regulations of the states requiring deposits by debtor on or before June 6, 1941, according to the method prayed for in the previous paragraph and Part J of this prayer, and

2) The debtor making additional deposits of the remainder of the available securities of each fund, in those states requiring deposits by debtor on or before June 6, 1941, and in every other state wherein contract holders of the debtor reside, by trust funds in the proportion in which each state's cash surrender liability claims of residents of each fund bears to the cash surrender liability claims of residents of every state of each fund, credit being made for previous deposits made according to the method of Part J and K-1 of this prayer.

[fol. 250] 1) That this Court enjoin the various state officials in control of securities deposited by the debtor from converting the income, dividends, and interest from the said securities and order the duly qualified and acting Reorganization Trustee to collect said income, dividends, and interest and place the same in the ten separate trust funds

of which the said securities are a part until each separate trust fund is restored to 100% of the cash surrender value so that those trust funds which are practically solvent at present and those other funds which will thereby become solvent can be administered in the manner provided by the terms of the contracts of the debtor, excepting interest and reserve provisions.

m) That further proceedings may be had upon this cross-petition in accordance with the provisions of Chapter X of said Act and that your cross-petitioners have such other relief as is just and necessary.

1 (S) D. C. Rivers, Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

2 (S) Pauline Rivers, Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

3 (S) R. A. McDowell, Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

4 (S) Arthur C. Burroway, Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

5 (S) W. Frank Armstrong, Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

6 (S) Edward F. Wiederhold, Jr., Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

7 (S) Carl H. Krippendorf, Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

8 (S) William G. Werner, Trustee for Margaret Ann Werner and Wm. Thomas Werner, Individually as Trustee [fols. 251-256] and for the Ohio, Indiana-Kentucky Creditors Committee.

9 (S) James E. Traquair, Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

10 (S) Merlin R. Granger, Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

11. (S) John J. Rivers, Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

12 (S) Parke G. Smith, Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

13 (S) Bela Klein, Individually and for the Ohio, Indiana-Kentucky Creditors Committee.

14 (S) Harry J. Gilligan, Trustee for John J. Gilligan, Jeanne Gilligan, Frank J. Gilligan, and Harry J. Gilligan, Jr., Individually as Trustee and for the Ohio, Indiana-Kentucky Creditors Committee.

15 The Ohio Indiana-Kentucky Creditors Committee Of Fidelity Assurance Association, Cincinnati, Ohio. By (S) Harry J. Gilligan, Chairman Pro-tem.

(S) Raymond Huwe, Attorney for Cross-Petitioners 1016 First National Bank Bldg., Cincinnati, Ohio.

(S) John J. Rivers, Attorney for Cross-Petitioners, 711 Traction Building, Cincinnati, Ohio.

*Duly sworn to by D. C. Rivers, et al. Jurats omitted in printing.*

[fol. 257] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING PART OF MOTION OF D. C. RIVERS, ET AL., TO INTERVENE BY CROSS PETITION, GRANTING PART OF MOTION TO RECEIVE NOTICES, FILE PLEADINGS AND MOTIONS, PRESENT TESTIMONY AND ARGUMENTS AND PROCEED AS DEEMED NECESSARY AS AN OHIO-KENTUCKY-INDIANA CREDITORS COMMITTEE—September 15, 1941

At Lewisburg, West Virginia, in said district, on the 4th day of September, 1941, D. C. Rivers, Pauline Rivers, R. A. McDowell, Arthur C. Burroway, W. Frank Armstrong, William G. Werner, James R. Traquair, Bela Klein and Harry J. Gilligan, Trustee for John J. Gilligan, Jeanne Gilligan, Frank J. Gilligan and Harry J. Gilligan, Jr., Cincinnati, Hamilton County, Ohio, Edward F. Wiederhold, Jr., Lebanon, Warren County, Ohio, Carl H. Krippendorf, Perintown, Clermont County, Ohio, Parke G. Smith, Amberly Village, Hamilton County, Ohio, John J. Rivers, St. Bernard, Hamilton County, Ohio, and Merlin R. Granger, Cincinnati, Hamilton County, Ohio and Indianapolis, Marion County, Indiana, having previously, at Charleston, West Virginia in said district, on August 26, 1941, presented for filing their motion for leave to intervene by a cross-petition seeking reorganization of the debtor, as individuals and as an Ohio-Kentucky-Indiana Creditors Committee of which they are members and the Court being fully advised in the premises and it appearing that an order should be entered upon said motion to intervene and to be designated as a



committee to receive notices generally of all matters arising in these proceedings with the right to file motions, pleadings and other papers and to be heard by testimony [fol. 258-269] and by argument and to take such other steps and procedure as it might deem necessary;

**It Is Ordered:**

1. That the motion to intervene by cross petition of D. C. Rivers Et Al., be and the same is hereby overruled.

2. That the Ohio-Kentucky-Indiana Creditors' Committee of which D. C. Rivers, Et Al. are members and those others subsequent joining said creditors' committee, be known and designated as "The Ohio-Kentucky-Indiana Creditors Committee" hereinafter in this proceeding and it is hereby designated to receive notices generally of all matters arising in these proceedings and is authorized to file motions and pleadings and other papers and be heard by testimony and by argument and to take such other steps and procedure as it may deem necessary, subject to the provisions of Chapters X of the Act of Bankruptcy and the rules and orders of this court.

3. That the Ohio-Kentucky-Indiana Creditors Committee be notified of all matters and proceedings herein by sending notices to Raymond Huwe, one of its counsel, addressed to 1016 First National Bank Building, Cincinnati, Ohio.

Ben Moore, United States District Judge for the Southern District of West Virginia.

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[fol. 270] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF A. CLYDE ROSS, TRUSTEE, AND BENJAMIN M. ROSS  
TO FILE AMENDED ANSWER—Filed September 17, 1941

To the Honorable Ben Moore, Judge of the District Court  
of the United States for the Southern District of West  
Virginia:

Now comes A. Clyde Ross, Trustee, etc. and Benjamin M. Ross, and move the Court for leave under Rule 15(a) to

amend their answer by filing the proposed amended answer in this proceeding, a copy of which is hereto attached.

Raymond Huwe, 1016 First National Bank Bldg., Cincinnati, Ohio. John J. Rivers, 711 Traction Building, Cincinnati, Ohio, Attorneys for a Clyde Ross and Benjamin M. Ross.

[fol. 271] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER OF OHIO AND KENTUCKY CREDITORS ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED CREDITORS OF THE SAME AND EVERY OTHER STATE, CONTROVERTING THE ALLEGATIONS OF DEBTOR'S PETITION—Filed September 17, 1941

To the Honorable Ben Moore, Judge of the District Court of the United States for the Southern District of West Virginia:

Now come A. Clyde Ross, Trustee for Dorothy Eillen Ross, and A. Clyde Ross, Trustee for Shirley Jean Ross, of Cincinnati, Hamilton County, Ohio, and Jenjamin M. Ross of Fort Wright, Kenton County, Kentucky, on behalf of themselves and all other persons similarly situated, contract holders and creditors of the Fidelity Assurance Association, formerly The Fidelity Investment Association, who may come in and seek relief herein and say:

That the questions which are the subject of this action are of common and general interest to all contract holders of the debtor, irrespective of what states they are residents, and of what deposits are held in the respective states in which they reside; ●

That these defendants are informed and believe that all of the contract holders and creditors of the debtor are persons constituting a class so numerous as to make it impracticable to bring them all before this Court, and that these defendants, one as a resident of Ohio and the other as a [fol. 272] resident of Kentucky, will fairly insure the adequate representation of all similarly situated persons because the character of the right sought to be enforced for or against this class is

1) Several, and the object of the action is adjudication of claims which may affect specific property involved in this action, and upon which all of these persons have a claim as cestui qui trust beneficiaries and a lien; and

2) Several, and there are common questions of law and fact affecting the several rights, and a common relief is sought under Rule 23 of the New Federal Rules of Civil Procedure.

These defendants further state that no other answer of creditors, including that of Driehorst, et al., filed in this proceeding, nor any pleading on behalf of creditors of the debtor, protects the above mentioned cestui qui trust beneficiary rights and lien right of all of the creditors of the debtor, nor has any pleading of any particular state official on behalf of creditors of his state protected the basic and fundamental West Virginia cestui qui trust beneficiary rights and lien rights of all of the creditors of the debtor, nor have the pleadings filed herein by Edgar B. Sims, Auditor of West Virginia and ExOfficio Insurance Commissioner of West Virginia, or the pleadings of the receivers of the debtor, Ross B. Thomas and H. Isaiah Smith, protected the basic and fundamental West Virginia cestui qui trust beneficiary rights and the lien rights of all contract holders of the debtor.

These defendants further state

1) That a statute of the United States, to-wit: Sections 137, 206 and 209 of Chapter X of the Bankruptcy Act (Chandler Act) as amended August 22, 1940, confers upon them an unconditional right to intervene in this proceedings;

[fol. 273] 2) That the representation by existing parties to this proceeding of their interests and the interests of all others similarly situated is inadequate, or may be inadequate, and their interests and the interests of all others similarly situated is, or may be, bound by a judgment in this action; and

3) That these defendants and all others similarly situated may be adversely affected by a distribution or other disposition of the property in the custody of the Court or in the custody of the Trustee, in reorganization or in liquidation, as an official of this Court.

These defendants state that the above circumstances provide them with the power to intervene in this proceeding as a matter of right, pursuant to rule 24(a) of the New Federal Rules of Civil Procedure.

In the alternative these defendants state that if the statutes of the United States, Sections 137, 206 and 209 of Chapter X of the Bankruptcy Act (Chandler Act) as amended August 22, 1940, do not confer an unconditional right to intervene, they confer a conditional right to intervene under the conditions described as appertaining to rule 23 hereinbefore stated, and further state that their claim and defense have questions of law and fact in common with the main action in this proceeding, and state that their intervention will not unduly delay or prejudice the adjudication of the rights of the original parties herein, as required in rule 24(b).

For an amended answer to the allegations of the petition of the debtor heretofore filed upon the 6th day of June, 1941, these answering defendants, after examining the records and reports of the debtor and of the former West Virginia state court receivers and of the Reorganization Trustee now serving in this proceeding, further aver:

[fol. 274]

# I

For an amended answer to Part I of said petition, these answering defendants admit the corporate existence of debtor under the laws of West Virginia until March 31, 1941, and its existence as a defacto corporation of West Virginia thereafter, including June 6, 1941, which could be reorganized under the provisions of Chapter X of the Bankruptcy Act of 1938 as amended August 22, 1940.

These answering defendants aver that the interests of the debtor in securities deposited by it with the West Virginia State Treasurer and/or the West Virginia Auditor and Ex-Officio Insurance Commissioner at Charleston, West Virginia, are of an equitable nature and are and were located in said city, and the Southern District of West Virginia for a longer portion of the six months immediately preceding the filing of the petition than in any other district by reason of the fact that the legal title holder of said securities and the trustee of said securities for the primary benefit of all cestui que trust contract holders, wherever residing, and for the secondary and resulting trust benefit



of the debtor, is personally within said city and district, and that said legal title-holder and trustee placed said securities, 95% endorsed to bearer, in the vaults of the Kanawha Valley Bank located in Charleston, West Virginia in said judicial district.

These answering defendants further aver that under the provisions of Section 3443(3) of Michie's Code of West Virginia laws the Treasurer of West Virginia and/or Auditor and Ex-Officio Insurance Commissioner of West Virginia is or are trustee or trustees of said securities, 95% of which are endorsed to bearer, for the benefit of all contract holders of the Special Income, Special Annuity, Special Annuity Matured and Retired, Series A, Series A Matured and Retired, Series B, Series B Matured and Retired, Series C, Series D, and Series D Matured and Retired funds of the debtor and that debtor's resulting and secondary equity [fol. 275] trust interests in said assets have existed within the above named judicial district and that said interests are its principal assets.

These answering defendants further aver that the majority of the above described trust funds are solvent and the debtor has a resulting trust equitable interest in the securities deposited in said district belonging to said solvent trust funds and that the debtor also has a resulting trust equitable interest in the securities deposited in said district belonging to the insolvent trust funds of debtor, and that the resulting trust equitable interest of the debtor in the securities belonging to solvent and insolvent trust funds is the only kind of interest which debtor owns in any of its assets, real or personal, and that all of its interests in any of its assets is junior to securities issued by it and deposited by it in said city and district in trust for the benefit of contract holders and these answering defendants.

## II

For an amended answer to Part II of said petition these answering defendants admit that the debtor is a corporation which could be adjudged a bankrupt under the Bankruptcy Act.

These answering defendants further aver that the debtor did not operate as an insurance company, that its 1941 West Virginia three months temporary license to do business as an insurance company expired; that it failed to secure a license to do business in any other state as an insurance com-

pany and that the nature of its business during and after its temporary license to do business as an insurance company was that of a bond investment company, receiving and disbursing installment payments upon previously sold installment face amount certificates, installment annuities and installment saving contracts.

These answering defendants further aver that the debtor until and including December 31, 1940 was a de jure installment [fol. 276] bond and face certificate investment corporation, and since January 1, 1941 when it failed to qualify under the National Investment Company Act of 1940, has been a de facto installment bond and face certificate investment corporation and could be adjudged a bankrupt under the said Act.

These answering defendants admit that the debtor is not a municipal, insurance or banking corporation nor a building and loan association nor a railroad corporation.

### III

For an amended answer to the first paragraph of Part III of said petition these answering defendants admit all of the allegations thereof.

For an amended answer to the second paragraph of Part III of said petition these answering defendants admit all of the allegations thereof.

These answering defendants further aver that the business executed by the debtor during its three months temporary West Virginia license as an insurance company and since the expiration of that license has been that of a de facto installment bond and face certificate investment corporation.

### IV

For an amended answer to Part IV of said petition these answering defendants admit all of the allegations thereof.

### V

For an amended answer to Part V of said petition these answering defendants admit that the debtor has in existence and outstanding investment and annuity contracts of a total reserve liability of approximately \$26,685,999.79.

These answering creditors further aver that the debtor has a resulting trust equitable interest, junior to the cestui que trust beneficiary interest of contract holders of the

debtor, in securities of the West Virginia sound-appraisal [fol. 277] value of approximately \$23,000,000 of which approximately \$13,000,000 sound-appraisal value are situate in Charleston, West Virginia in the Southern District of West Virginia.

These answering defendants, for want of information and belief, neither affirm nor deny the correctness and veracity of the fullness or truthfulness of the statement of all of the assets and liabilities of debtor, incorporated by reference in Part V of the debtor's petition, and attached to said petition and marked "Exhibit A" therein, but aver that said "Exhibit A" is the only financial statement in existence which shows the financial condition of the debtor as of October 31, 1940 and should be accepted as such by the Court with reservations as to its correctness and veracity.

## VI

For an amended answer to Part VI of said petition these answering defendants admit all of the allegations thereof with reference to the West Virginia, Kanawha County Circuit Court Receivership suit and receivership suits in other states.

These answering defendants further aver that the debtor's resulting trust equitable interest in the securities deposited by debtor in states other than West Virginia in the approximate West Virginia sound-appraisal value of \$10,000,000 is or are the asset or assets of the debtor which these other state receivers, at least fifteen in number, have taken charge of for the benefit of resident contract-holders of their state.

These answering defendants further aver that contract-holder-creditors of the debtor, residing in almost every other state, have a primary equitable and cestui que trust interest in the securities deposited in every state where these state receivers have taken charge for the benefit of the resident contract holders of their state.

## VII

For an amended answer to Part VII of said petition these [fol. 278] answering defendants admit all of the allegations thereof concerning the necessity to modify the contracts of the debtor and its contract holders with reference to interest and reserve provisions and concerning the inadequacy

of relief under Chapter XI of the Act with reference to such modifications.

These answering defendants further aver, with reference to the third paragraph of Part VII of said petition, that each of the contracts of the debtor, according to the terms of said contracts, is secured by a reserve fund.

These defendant-creditors further state that debtor's course of conduct and operations has been such as to establish not only a reserve fund but an actual trust with title divested from itself and in the Auditor and Ex-Officio Insurance Commissioner of West Virginia or the Treasurer of West Virginia, of securities purchased from the payments of these defendant-creditor contract holders, and all others similarly situated, and that deposits of securities made in states other than West Virginia are a part of said trust, legal title to which is in the Auditor and Ex-Officio Insurance Commissioner or Treasurer of West Virginia, but which have been deposited in other states in lieu of being deposited in the custody of the officials of West Virginia.

These answering defendants further aver that those deposits of securities in states other than West Virginia are either held as a trust imposed upon the basic and fundamental trust in West Virginia, or as a bailment or pledge imposed upon the basic or fundamental trust in West Virginia, and are a trust upon a trust, or a bailment upon a trust, according to the functions of the officials of said other states, as established by the laws of said states.

These answering defendants further aver that the solvency of the majority of trust funds described by the debtor as reserve funds, prevents a forfeiture of the equity of [fol. 279] redemption or resulting trust equitable interest of the debtor in the securities belonging to said trust and reserve funds.

### VIII

For an amended answer to Part VIII of said petition these answering defendants admit all of the allegations thereof.

### IX

For an amended answer to Part IX of said petition, these answering defendants, after examining the records and reports of the debtor and of the former West Virginia State Court Receivers and of the Reorganization Trustee now



serving in this proceeding, join in the desire of the debtor that a plan of reorganization be affected under the provisions of Chapter X of the Bankruptcy Act.

The Investors Syndicate, a Minnesota corporation, and a competitor of the debtor, has qualified under the provisions of the Investment Company Act of 1940 and the wholly owned subsidiary of the debtor, Fidel Association of New York, Incorporated, has always met in the stringent requirements of the laws of New York and Connecticut and the regulatory control of their state officials, and these answering defendant creditors believe that a plan of reorganization is reasonable which may be similar to the organization of any competitor now qualifying and operating under provisions of the Investment Company Act of 1940.

These answering defendants further aver that if new capital is required it might be obtainable from the Reconstruction Finance Corporation or from other public or private sources, or from income of the separate trust funds of debtor according to the plan expressed in Part F of the prayer of this amended answer.

These answering defendants further aver that the specific facts showing the need for relief under Section X of said Act are as follows:

[fol. 280] 1. The earnings from Investments of said debtor required by the laws and rules and regulations of officials of various states in recent years have been insufficient, and the prospective earnings in future years at present appear to be insufficient to enable it to meet its liabilities under its contracts executed with its contract holders;

2. The assets in which the debtor has an interest, to-wit: industrial, financial, railroad, public utility, federal farm loan, municipal, U. S. Government, foreign governmental, foreign corporation, and real estate bonds and mortgage notes and domestic corporation preferred stocks, are of substantial value and will mature in the future at a higher value than their present market values, which on June 6, 1941 approximated \$23,640,000. These assets, if preserved and not liquidated or sold at this time, will have a much greater value as assets of a reorganized going concern and will provide the contract holding creditors of the debtor, if the debtor is reorganized, with a much greater return to them of their investment and money than if

presently liquidated and if hereafter valued upon the current standards established by the National Association of Insurance Commissioners or by the Board of Governors of the Federal Reserve Banking System;

3. The debtor has not qualified to do business under the Investment Company Act of 1940;

4. The debtor is in need of reorganization for the above reasons and cannot successfully effect a reorganization unless under a judicial proceeding in a court with nationwide jurisdiction.

5. The proposed reorganization by the West Virginia Auditor and Ex-Officio Insurance Commissioner under the West Virginia, Kanawha Circuit Court, became ineffective when that Court's jurisdiction did not include jurisdiction [fol. 281] over the officials in fifteen different states holding deposits of the debtor and who could not be enjoined from selling securities deposited by the debtor in which the contract holders had an interest. The only judicial proceeding in which the debtor can be effectively reorganized, in view of the above facts, is the Federal Court with nationwide jurisdiction to prevent any acts prejudicial to the interest of the contract holders in the debtor's deposits in West Virginia and in all other states.

## X

For an amended answer to Part X of said petition these answering defendants admit, as true and correct, the statements in the resolution of the debtor, "Exhibit B" of debtor's petition.

These answering defendants further aver that the insolvency of some of the trust funds of the debtor provide the debtor with a resulting trust interest in securities deposited by it in Charleston in the Southern District of West Virginia and provide the United States District Court in that district with jurisdiction and venue over the debtor's property, the legal title holder and trustee personally residing and having official office headquarters therein and the securities, 95% endorsed to bearer, physically deposited, therein in the control of the legal title holder and trustee.

These answering defendants further aver that those members of the Board of Directors who may not have ob-

tained exemptions from the application of the rules and regulations of the Securities and Exchange Commission and the provisions of the Investment Company Act of 1940, and who may not have complied with the provisions of the injunction of December, 1939, and including that member of the Board of Directors who had not qualified as a stockholder and who was elected for and served only for that part of the meeting in which the resolution to file a petition under Chapter X of the Bankruptcy Act was voted upon, were de facto directors of the debtor upon [fol: 282] June 3, 1941, and their action in passing the resolution heretofore described upon said date is binding upon the corporation and all third persons upon collateral attack, including the creditors-contract-holders of the debtor, the state officials of the various states in which the debtor was engaged in business, and the state and federal court receivers appointed for the debtor therein.

These answering defendants further aver that the debtor was a de facto installment bond investment and face amount certificate corporation, and that the action of its Board of Directors in passing the resolution authorizing the filing of a petition for reorganization under Chapter X of said Act is valid and sufficient to obtain the relief sought under Chapter X of said Act.

These answering defendants further aver that the insolvency of the debtor with respect to some of the trust funds and the failure of its total assets to equal its total liabilities upon June 3, 1941 changed the directors of the debtor to trustees for creditors only with claims prior to those of the corporation and stockholders in the resulting trust interest of the debtor in its securities-assets and the meeting and resolution of that date was not required to meet the provisions of by-laws; protecting the corporation, officers, directors and stockholders with respect to the contents of the notice and place of meeting; to be an effective attempt to obtain relief by petition for reorganization under Chapter X of the Act.

Wherefore, your answering defendants pray:

A) That the Court determine that the West Virginia laws established a basic and fundamental trust for the benefit of the contract holders everywhere and that the laws of other states where the debtor also deposited securities, and filed in West Virginia in lieu of securities a certificate

of such other state deposit, established a trust or a lien [fol. 283] superimposed upon the basic West Virginia trust for the benefit of resident contract holder creditors of those other states.

B) That the Court determine that the course of conduct and operations of the debtor from the very first contact with the contract holder creditor established a trust relationship and that the installment cash payments of the contract holder, while for a short time commingled with cash payments of different trust funds into a single cash bank account were always separately maintained upon the debtor's books as separate trust fund cash accounts and subsequently invested in securities held separately as trust funds.

C) That the Court classify contract holder creditors:

1) Upon the basis of ten separate trust funds, to-wit: As Special Income, Special Annuity, Special Annuity Matured and Retired, Series A, Series A Matured and Retired, Series B, Series B Matured and Retired, Series C, Series D, and Series D Matured and Retired.

2) And then further classify each of the above ten into those fully secured, those partially secured and those unsecured by the deposits of debtor within the states in which they reside.

D) That the Court order the duly qualified and acting Trustee in Reorganization not to change the total value of the securities deposited in states other than West Virginia but to substitute securities therein by placing in each state securities belonging to the several funds against which residents of such state have cash surrender liability claims sufficient in value to approximately equal the proportion which each separate fund's cash surrender liability claims of residents in the state bears to the total cash surrender liability claims of residents in the state, providing, however, [fol. 284] that the character of the substitute securities meets with the requirements of the particular states' laws, rules and regulations.

E) That the Court order the duly qualified and acting Trustee in Reorganization to provide a plan of reorganization which includes

1) The debtor first meeting the requirements of the deposit laws, rules and regulations of the states requiring



deposits by debtor on or before June 6, 1941, according to the method prayed for in the previous paragraph and Part D of this prayer, and

2) The debtor making additional deposits of the remainder of the available securities of each fund, in those states requiring deposits by debtor on or before June 6, 1941, and in every other state wherein contract holders of the debtor reside, by trust funds in the proportion in which each state's cash surrender liability claims of residents of each fund bears to the cash surrender liability claims of residents of every state of each fund, credit being made for previous deposits made according to the method of Part- D and E-1 of this prayer.

F) That this Court enjoin the various state officials in control of securities deposited by the debtor from converting the income, dividends, and interest from the said securities and order the duly qualified and acting Reorganization Trustee to collect said income, dividends, and interest and place the same in the ten separate trust funds of which the said securities are a part until each separate trust fund is restored to 100% of the cash surrender value so that those trust funds which are solvent at present and those other funds which will thereby become solvent can be administered in the manner provided by the terms of the contracts of the debtor, excepting interest and reserve provisions.

G) That further proceedings may be had upon this amended answer in accordance with the provisions of Chapter X of said Act and that your answering defendants have such other relief as is just and necessary.

A. Clyde Ross, Trustee for Dorothy Eillen Ross and  
A. Clyde Ross, Trustee for Shirley Jean Ross,  
6316 Iris Avenue, Cincinnati, Ohio. Benjamin M.  
Ross, 18 Crittenden Ave., Fort Wright, Kenton  
County, Kentucky.

*Duly sworn to by A. Clyde Ross et al. Jurat omitted in printing.*

[fols. 286-286a] IN UNITED STATES DISTRICT COURT

[Title omitted]

**ORDER OVERRULING MOTION OF A. CLYDE ROSS, TRUSTEE, AND  
BENJAMIN M. ROSS SEEKING TO AMEND THEIR ANSWER BY  
FILING AN AMENDED ANSWER—September 17, 1941**

At Charleston, West Virginia, in said District, on the 16th day of September, 1941, A. Clyde Ross, Trustee and Benjamin M. Ross, having been granted leave upon July 19, 1941 to file an answer controverting the debtor's petition in this proceeding, on behalf of themselves and/or their beneficiaries and all others similarly situated, now move to amend their answer during the progress of the hearing upon the jurisdiction of the Court in this proceeding, by filing an amended answer in which they now join with the debtor in its desire to be reorganized.

And the Court, finding that the proposed amended answer of said creditors does not controvert the debtor's petition, as contemplated by the provisions of Section 137 of Chapter X of the Bankruptcy Act,

It Is Ordered that the motion of A. Clyde Ross, Trustee, and Benjamin M. Ross to amend their answer by filing said amended answer is hereby overruled and denied, to all of which A. Clyde Ross, Trustee, and Benjamin M. Ross, except.

Ben Moore, Judge of the District Court of the United States.

[fols. 287-288] IN UNITED STATES DISTRICT COURT

[Title omitted]

**ORDER APPROVING ELECTION, ETC.—October 2, 1941**

This day came the Debtor, by its attorneys, and represented to the Court that a meeting of its Stockholders and a meeting of its Directors are scheduled to be held at Wheeling, West Virginia, on October 3, 1941, and moved that the Court approve the election at said Stockholders meeting of Philip D. Paull, James Paull, Robert Riley, Elwood Thomas, T. Harvey Pollock, H. Julian Ulrich, W. L. Burt, A. C. Hazlett, Gordon Hobstetter and George Miller

as Directors to fill vacancies, and the election at said Directors meeting of Allen G. Messick as Chairman of the Board, John Marshall, Sr. as President, F. H. Pulfer as Vice-President and Secretary, John Marshall, Jr., as Vice-President and Treasurer, Howard E. Reed as Vice-President, W. J. Gribben as Auditor, H. C. Hobstetter as Registrar, C. E. Smith as Assistant Secretary, M. von Berg as Assistant Treasurer, M. A. Monahan as Assistant Registrar, and Allen G. Messick, John Marshall, Sr. John Marshall, Jr., F. H. Pulfer and D. A. Burt as members of the Executive Committee, and upon consideration whereof the Court doth sustain the said motion, and it is Ordered that the election of the above named persons as directors, officers and members of the Executive Committee of the Debtor, respectively, is hereby approved.

Ben Moore, Judge U. S. D. C.

[fol. 289] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF TRUSTEE SEEKING INSTRUCTIONS OF THE COURT  
ON AN OFFER RECEIVED BY THE TRUSTEE FOR THE PURCHASE  
OF FIDEL ASSOCIATION OF NEW YORK—Filed October 3, 1941

To the Honorable Ben Moore, Judge of Said Court:

Your petition respectfully represents unto the Court that on the 25th day of September, 1941, it received a letter from Pell, Ltd., of 80 Broad Street, New York City, and a purported list of the directors of Pell, Ltd., wherein the said Pell, Ltd. offer to purchase from your Trustee for cash all of the common stock of Fidel Association of New York, Incorporated, at the liquidating value thereof to be determined by Haskins & Sells as of the date of delivery of such stock.

All of the said common stock of Fidel is owned by the debtor herein and is on deposit with the Insurance Commissioner of West Virginia, along with other securities held by said Commissioner. Attached hereto and incorporated in this petition by reference is a copy of the letter and list of directors received from Pell, Ltd., as aforesaid. Your petitioner has caused notice to be given to the parties to this suit that this petition would be presented on the third

day of October, 1941, at ten o'clock A. M., and your petitioner has requested the said Pell, Ltd., to have its attorney or other representative present in court on said day to give such further explanations to the aforesaid offer as the Court or any party in interest may deem proper.

Your petitioner therefore prays that this petition be filed, that a hearing be held hereon on the said third day of October, 1941, and that such order be entered in connection herewith as may appear proper to the Court.

Central Trust Company, Trustee, by A. A. Payne,  
Vice President.

[fol. 290]

EXHIBIT TO PETITION

Copy

Chemical, Pharmaceutical and Industrial Development  
Management and Organization.

Pell, Ltd.

New York

80 Broad Street

September 24, 1941.

Central Trust Company, Trustee in Reorganization of Fidelity Assurance Association, Charleston, West Virginia.

DEAR SIRS:

We hereby offer to purchase from you for cash all of the common stock of Fidel Association of New York, Incorporated at the liquidating value thereof to be determined by Haskins & Sells as of the date of delivery of such stock.

This offer is predicated upon the accuracy of a balance sheet of Fidel Association of New York, Incorporated as of June 30, 1941 and a statement relating to its income and expenses for the six months ending that date, which were submitted for our examination by Mr. Hubert F. Young on September 19, 1941.

It is a term of this offer that, when establishing liquidating value, Haskins & Sells are to appraise underlying securities at market value and not at cost.

This offer may be accepted by you, with the approval of the United States District Court for the Southern District



of West Virginia at any time within thirty days from September 19, 1941.

When, as and if this offer is accepted, we are prepared to give serious consideration to furnishing additional capital in Fidelity Association of New York, Incorporated for the purpose of reorganizing Fidelity Assurance Association,, if some equitable plan, satisfactory to us, can be agreed upon by the necessary parties in interest.

Yours very truly, Pell, Ltd., by Arlen G. Swiger, Secretary and Treasurer.

[fol. 291]

Pell, Ltd.  
Directors

ARMOUR, B. R. 50 Union Square,  
New York, N. Y.

American Aniline Products, Inc.	Pres., Treas. and Dir.
Ansbacher-Siegle Corp.	Pres. and Dir.
The Aspinook Corporation	Director
Charles Helmuth Prtg. Ink Corp.	President
The Hartford Rayon Corporation	Pres. and Director
Heyden Chemical Corp.	Pres. and Director

CALDER, CURTIS E. 2 Rector Street,  
New York, N. Y.

American & Foreign Power Co. Inc.	Pres. and Dir.
A. T. Walraven Book Cover Co.	V. Pres. and Dir.
British Columbia Power Corp. Ltd.	Director
Italian Superpower Corp.	Director
National City Bank of N. Y.	Director
Selected Industries Inc.	Director
Southwestern Sewer Co.	Pres. and Dir.
U. S. & Foreign Securities Corp.	Director
U. S. & International Securities Corp.	Director

DIFFENBACH, B. G. 117 Liberty St.,  
New York, N. Y.

Blair & Co. Inc.	Vice-Pres. and Dir.
Blair Securities Corp.	Director
Cuban American Manganese Corp.	Director
Electric Ferries, Inc.	Pres. and Dir.
Freeport Sulphur Co.	Director
Brooklyn and Richmond Ferry Co.	Director
Bayonne-Staten Island Ferries, Inc.	Director

EMANUEL, VICTOR 420 Lexington Avenue,  
New York, N. Y.

Albert Emanuel Co. Inc.	Pres. and Dir.
Aviation & Transportation Corp.	Pres. & Chrmn. of Bd.
The Aviation Corp.	Pres. and Director
Emanuel & Co.	Limited Partner
Pak-Age-Car Corp.	Director
Republic Steel Corp.	Member Ex. Com. & Dir.
Standard Gas & Electric Co.	Chairman of Board
Standard Power & Light Corp.	Pres. & Director

GUMPERT, L. JAMES 386 Fourth Avenue  
New York, N. Y.

B. T. Babbitt & Co.	Director of Sales
Holly Products Corp., Calif.	Secretary
B. Meyers Lye Corp., St. Louis.	Secretary

JOSEPOWITZ, GRIGORI 224 W. 30th St.,  
New York, N. Y.

Societe Industrielle pour le traitement des Metaux, Paris, France.....	Pres. and Director
Societe Parisienne des Products Chimiques, Paris, France.....	Pres. and Director
Eitington-Josef, Inc. New York.....	Pres. and Director

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KRAMER, RAYMOND C. 253 Broadway  
New York, N. Y.

Allied Stores Corp.....	Director
Belcoart Corp.....	Pres. and Dir.
Continental Shares.....	Director
Gimbel Bros. Inc.....	Director
Interstate Dept. Stores, Inc.....	Chrmn. of Board
Postal Telegraph Cable Co.....	Director
Selby Shoe Co., Portsmouth, O.....	Director
Stowell Spool Co., Portland, Me.....	Director
Transcontinental & Western Air, Inc.....	Director
United Cigar-Whelan Stores Corp.....	Director

PELL, HAMILTON 40 Wall Street,  
New York, N. Y.

Pell & Co. (Members N. Y. Stock Ex.).....	Senior Partner
Acony Corp.....	V. Pres. and Dir.
The Aspinook Corporation.....	Director
Chemicals & Pharmaceuticals, Inc.....	Pres. and Dir.
Community Power & Light Co.....	Director
Compo Shoe Machinery Corp.....	V. P., Member Ex. Com. and Director
Consolidated Corp.....	V. Pres. and Dir.
Directory of Directors.....	Director
Dominion Gas & Electric Co.....	Director
Electric Ferries, Inc.....	Director
General Public Utilities, Inc.....	Director
General Water, Gas & Electric Co.....	Director
The Hartford Rayon Corporation.....	Director
Houston Gulf Gas Co.....	Director
International Utilities Corp.....	Director
Mengel Co.....	Director
Professional Laboratories, Inc.....	Director
Standard Gas & Electric Co.....	Director
U. S. Vitamin Corporation.....	Mem. Ex. Com., Chrmn. of Board

RICHARD, HAROLD C. 681 Eighth Avenue,  
New York, N. Y.

1060 Fifth Avenue.....	Treas. and Dir.
Adolf Gobel, Inc.....	Director
Carib Syndicate, Limited.....	Director
Foundation Co. (Foreign) The.....	V. P. and Dir.
General Bronze Corp.....	Chrmn. of Board
Graniteville Co.....	Director
Manufacturers Trust Co.....	Director
Midland Steel Products Co.....	Director
Murray Corp. of America.....	Director
Northeastern Insurance Co. of America.....	Director
U. S. Vitamin Corporation.....	Director

SCHATZREIN, HENRY A. 80 Broad Street,  
New York, N. Y.

Chemicals & Pharmaceuticals, Inc.....	Director
U. S. Vitamin Corporation.....	Director

[fol. 293]

STARR, CORNELIUS V. 111 John St.,  
New York, N. Y.

American Asiatic Underwriters Federal, Inc., U. S. A. of Shanghai, China.....	Director
American International Underwriters Corp. of N. Y.	Director
Asia Life Insurance Co. Shanghai, China and Wilmington, Del.....	Chrmn. of Board
Compagnie Franco Americaine d'Assurances of Paris, France.....	Director
International Assurance Co. Ltd. Shanghai, China.....	Director
Tai Shan Insurance Co. Ltd. Shanghai, China.....	Director
Underwriters Bank for the Far East, Inc. of Shang- hai, China, and Conn.....	Director
U. S. Life Insurance Co. in the City of New York (The).....	Pres. and Dir.

STEWART, CECIL P. 67 Wall Street,  
New York, N. Y.

American Merchant Marine S. S. Corp.....	Pres. and Dir.
Atlantic Coast Fisheries Co.....	Director
Bloedel Donovan Lumber Mills.....	Director
C. P. Stewart & Co. Inc.....	Pres. and Dir.
C. P. Stewart & Co. Ltd. (London, England).....	Chrmn. of Board
Centre Island Association.....	President
Dawnie Steamship Corp.....	Director
Frank B. Hall & Co. Inc.....	Pres. and Chrmn. of Board
Hall Murphy & Co. of Oregon.....	Chrmn. of Board
Incorporated Village of Centre Island.....	Trustee
Lawyers Title Corp. of N. Y.....	Director
Munson Line, Inc.....	Chmn. of Board
Oregon Steamship Corp.....	Pres. and Dir.
Pilot Reinsurance Co. of N. Y.....	Director
Stewart, James & Co.....	Chrmn. of Board

SWIGER, ARLEN G. 60 East 42nd Street,  
New York, N. Y.

Swiger, King & Chambers.....	Senior Partner
The Aspinook Corporation.....	Secy. and Dir.
Compo Shoe Machinery Corp.....	Director
The Hartford Rayon Corporation.....	Director
North European Oil Corp.....	V. Pres. and Dir.
U. S. Vitamin Corporation.....	Secy., Dir., Mem. Exec. Committee

WASEY, LOUIS R. 420 Lexington Ave.,  
New York, N. Y.

Erwin Wasey & Co.....	Pres. and Dir.
Primrose House, Inc.....	Director

ROSENBLATT, WILLIAM 80 Broad St.  
New York, N. Y.

Cuban Iron Ore Co.....	Vice Pres. & Dir.
Modern Industrial Bank of N. Y. C.....	Dir.
Postal Telegraph Inc.....	"
U. S. Vitamin Corporation.....	"

[fol. 294] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER—October 4, 1941

Coming now for consideration the petition of Edward J. Hughes, Secretary of State of the State of Illinois, Warren Wright, Treasurer of the State of Illinois, by George F. Barrett, Attorney General of the State of Illinois, and S. Leigh Call, Receiver of Fidelity Association, by appointment of the Circuit Court of Sangamon County, Illinois, by Edmund Burke, and Gillespie, Burke & Gillespie, his attorneys; and the Court having considered the said motion;

It is hereby ordered with respect to the turn-over orders entered by this Court on the 6th day of June, the 10th day of June and the 9th day of August, 1941, and all orders heretofore entered herein in any way modifying or affecting the same are hereby interpreted and declared by the Court with respect to the securities in Illinois deposited by the Debtor for the benefit of contract holders, that the said State Treasurer and Secretary of State of the State of Illinois be not required by virtue of said orders to turn over physical possession of such securities to the Trustee of the Debtor herein until such time as a plan for reorganization has been regularly adopted and approved by this Court and approved by the creditors of the Debtor under the provisions of Chapter 10 of the United States Bankruptcy Act.

It is further ordered and declared that it shall not be a violation of the aforementioned order for S. Leigh Call, Receiver aforesaid, to return to and pay over to the proper state officials of the State of Illinois any and all such assets of the Debtor received by him from such officials under [fols. 295-298] the direction of the Circuit Court of Sangamon County, Illinois.

Whereupon, the said Warren Wright, Treasurer of the State of Illinois, Edward J. Hughes, Secretary of the State of Illinois, and S. Leigh Call, Receiver as aforesaid, withdraw their several answers, petitions and motions heretofore filed and now pending in these proceedings. Said interveners, however, reserve their respective status as an intervener in these proceedings, and their right to participate as such herein.

Entered this 4th day of October, 1941.

Ben Moore, United States District Judge.



[fols. 299-300] IN UNITED STATES DISTRICT COURT

[Title omitted]

**ORDER FILING REPORT OF TRUSTEE—October 10, 1941**

This day came the Central Trust Company, Trustee, and presented to the Court the first part of its report as required by Section 167 of the Federal Bankruptcy Act, which said first portion of said report is hereby ordered filed.

Ben Moore, U. S. D. J.

(The Report of the Trustee under Sec. 167, Chap. 10 of the Bankruptcy, referred to in the foregoing order, is omitted from the record at this point as same is being transmitted in original form in accordance with instructions of Court Order entered March 7, 1942).

[fol. 301] IN UNITED STATES DISTRICT COURT

[Title omitted]

**MOTION BY EDGAR B. SIMS, AUDITOR AND EX-OFFICIO INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA—  
Filed October 27, 1941**

This 27th day of October, 1941, comes Edgar B. Sims, Auditor and Ex-Officio Insurance Commissioner of the State of West Virginia, and relates unto the Court that he has been permitted by the Court to intervene in this case, by reason of the fact that certain orders of the Court made on June 6th, June 10th and August 9th, 1941 were entered by the Court which affect him in his official capacity as an official of the State of West Virginia.

Your said petitioner hereby moves the Court that the injunctive order of August 9, 1941, in so far as it affects your petitioner, be dissolved, for the reason that the deposit of Fidelity Assurance Association was made to and with the State of West Virginia in pursuance of the statutes of West Virginia and in accordance therewith, and by virtue of the fact that the said company at the time the said deposit was made was a copy within the purview of Section 1, Article 9, Chapter 33 of the Code of West Virginia, and the said deposit was made by virtue of Section 3 of said Article 9.

Your petitioner further relates unto the Court that the license of said company, issued by virtue of said Section 1 of Article 9, was not renewed as of January 1, 1941, and on April 1, 1941, the license of the said company to sell insurance was revoked by your said petitioner, and thereafter no license was or is held by the said company to solicit or receive deposits or payments on any annuity contracts or certificates, or annuity bonds, within the State of West Virginia, nor any license to sell insurance policies within the State of West Virginia.

Your petitioner says that by virtue of Section 10 of said Article 9, when the said license of the debtor was not renewed on January 1, 1941, and its license was revoked on April 1, 1941, it became his duty, by virtue of said Section 10 of the laws of the State of West Virginia, to retain authority and control over the deposit of the debtor with the [fol. 302] State of West Virginia until the total liability for contract certificates or annuity bonds and contracts issued by the debtor in the State of West Virginia was redeemed or settled, and that the said injunctive order interferes with and prevents the performance of his official duties, by virtue of said Section 10, and his official discretion thereunder, and should therefore be dissolved.

Your petitioner further says that said statutes of the State of West Virginia were lawfully passed and are not an interference with the Court or superseded by the Bankruptcy Act, and that the issuance of the said injunctive order is in purpose and effect a suit or proceedings against an official representative of the Sovereign State of West Virginia, and is therefor prohibited by the Eleventh Amendment to the Constitution of the United States.

Therefore, your petitioner moves this Honorable Court that in so far as said injunction affects him in his official and representative capacity as an official of the State of West Virginia, and in so far as said injunction is a suit or proceedings against the Sovereign State of West Virginia, that the said injunction be dissolved.

Edgar B. Sims, Auditor and Ex-Officio Insurance Commissioner of the State of West Virginia, by Clarence W. Meadows, Attorney General, and Ira J. Partlow, Assistant Attorney General of the State of West Virginia, (S.) Clarence W. Meadows, Ira J. Partlow.

[Title omitted.]

MOTION BY EDGAR B. SIMS, AUDITOR AND EX-OFFICIO INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA, ON BEHALF OF ROSS B. THOMAS AND H. ISAIAH SMITH, WEST VIRGINIA STATE COURT RECEIVERS—Filed October 27, 1941

This 27th day of October, 1941, comes Edgar B. Sims, Auditor and Ex-Officio Insurance Commissioner of the State of West Virginia, and relates unto the Court that he has this day heretofore filed a motion with respect to an order or decree of this Court entered on August 9, 1941, and he herewith states unto the Court that the facts therein set up shall be considered as facts set up in this motion and for the purpose of this motion, in so far as they relate thereto.

Your petitioner further says that under and by virtue of the insurance laws of the State of West Virginia, as set out in Chapter 33 thereof, and by virtue particularly of Section 45 of Article 2 of said Chapter 33, on April 11, 1941, in his opinion, the debtor herein became insolvent or was in such financial condition as not to be able to pay its creditors in this State, and he thereupon filed his bill in the Circuit Court of Kanawha County for the administering of the assets of the debtor as an insolvent, and for the purpose of taking possession of its property in this State and the distributing of its assets among those entitled thereto according to their respective rights, as is provided in said Section 45.

Your petitioner further says that thereafter, at his request and suggestion, the Circuit Court of Kanawha County appointed H. Isaiah Smith and Ross B. Thomas receivers of said company for the purpose of taking possession of its property in this State, and that said West Virginia State Court Receivers did thereafter take possession of, to-wit, \$700,000.00 of assets in the State of West Virginia as property of the debtor herein.

Your petitioner further relates unto the Court that by virtue of the turn-over orders of this Court entered on June 6th and June 10th, 1941, and confirmed by the order of this Court of August 9th, 1941, those West Virginia State Court [fol. 304] Receivers did turn over that property of the debtor which they had taken into possession, as agents of

your petitioner, to the Central Trust Company, Trustee of the debtor herein, but nevertheless under written protest, which written protest is as follows:

"Ross B. Thomas and Isaiah Smith, Receivers of Fidelity Assurance Association, by virtue of an order of the Circuit Court of Kanawha County, West Virginia, entered on the 11th day of April, 1941, and acting as Receivers since said date, under the direction of said Court, and by reason of said order, and said Receivers having been served with a copy of an order entered by the United States District Court for the Southern District of West Virginia on June 6, 1941, requiring them to turn over all property and assets of the Fidelity Assurance Association in their possession or under their control to Central Trust Company, Trustee in Bankruptcy, appointed in said order of June 6, 1941, by said United States District Court, and further ordering and requiring them to refrain from any further acts or action with respect to their said appointment as Receivers, do hereby, over their objection and protest, obey said order, nevertheless stating and believing said order not to be a valid one, but to be void and of no legal effect, and further stating that they obey said order only and for no other reason than that they be not compelled to take the risk of being held to be in contempt of said United States District Court for failure to obey its orders; nevertheless reserving unto themselves, as Receivers, all of their legal rights and privileges, including the right to test the legality and validity of said order of June 6, 1941, the jurisdiction of said United States District Court in entering said order and in all other matters arising by virtue of the institution of the proceedings in which said order was entered."

Your petitioner relates unto the Court that by virtue of the laws of the State of West Virginia and the proceedings related hereunder, the said West Virginia State Court Receivers were agents of your petitioner for the purpose of taking possession of the property of the debtor in the State of West Virginia, and that such possession was in fact and effect the possession of your petitioner, and that the turn-over orders were in fact and effect directed against your petitioner as an official of the State of West Virginia in his official capacity, and therefore against the Sovereign State of West Virginia, and as such were prohibited by the Eleventh Amendment to the Constitution of the United States.

Your petitioner relates, upon information and belief, that with the exception of the receivers appointed for a small amount of property in the State of Ohio, no other state court receivers or statutory officials in any state have made any turn-over to the trustee of the debtor herein, except those agents of your petitioner, to-wit, the West Virginia State Court Receivers.

Therefore, your petitioner alleges that the said turn-over orders of June 6th and June 10th, as confirmed by the order of August 9th, 1941, made against H. Isaiah Smith and Ross B. Thomas, were in fact and effect made against your [fol. 305] petitioner as the principal of them, his agents, and were in fact and effect made against the Sovereign State of West Virginia, and interfered with the official discretion of your petitioner in his representative capacity as an official of the State of West Virginia, and were therefore prohibited by the Eleventh Amendment to the Constitution of the United States.

Wherefore, your petitioner moves this Court that said turn-over orders, in so far as they affect your petitioner by and through his agents, the West Virginia State Court Receivers, be rescinded, and that the Central Trust Company, trustee herein, be required to turn back all of the property, securities and assets heretofore turned over to it by the said West Virginia State Court Receivers to the said West Virginia State Court Receivers, and that the said injunction of August 9th, 1941, in so far as it affects the said West Virginia State Court Receivers and their possession of the said funds, assets and securities, be dissolved.

Edgar B. Sims, Auditor and Ex-Officio Insurance Commissioner of the State of West Virginia, By Clarence W. Meadows, Attorney General, and Ira J. Partlow, Assistant Attorney General, of the State of West Virginia. (S) Clarence W. Meadows.

[fol. 306] IN UNITED STATES DISTRICT COURT

[Title omitted.]

MOTION OF H. ISALAH SMITH AND ROSS B. THOMAS, WEST VIRGINIA STATE COURT RECEIVERS—Filed October 27, 1941

This 27th day of October, 1941, came H. Isaiah Smith and Ross B. Thomas, West Virginia State Court Receivers



of Fidelity Assurance Association, and relate unto the Court that they have been advised of the motions heretofore this day filed by Edgar B. Sims, Auditor and Ex-Officio Insurance Commissioner of the State of West Virginia, and that they adopt the facts as set out in said motions as a part of this motion.

Your petitioners respectfully adopt in full the motion of Edgar B. Sims, Auditor, etc., as it affects or purports to affect them, and join in the motion of said Edgar B. Sims, Auditor, etc., that the said turn-over orders and the said injunctive order as it concerns them as West Virginia State Court Receivers and as agents of the said Edgar B. Sims, Auditor, etc., be rescinded and dissolved, and that the Central Trust Company, trustee of the debtor herein, be required to turn back to them all of the funds, assets and securities heretofore turned over to it by your said petitioners because and by virtue of said turn-over orders and injunction.

H. Isaiah Smith and Ross B. Thomas, West Virginia State Court Receivers, By: Koontz & Koontz, Counsel for said West Virginia State Court Receivers. (S.) Koontz & Koontz.

[fol. 307] IN UNITED STATES DISTRICT COURT

[Title omitted.]

ORDER—October 29, 1941

This cause coming on for hearing on the motion of Don H. Ebright, Treasurer of State of the State of Ohio, and having been argued by counsel and submitted to the court and the court having carefully considered same;

It is ordered with respect to the turnover orders entered by this court on the 6th day of June, 1941, the 10th day of June, 1941, and the 9th day of August, 1941, and all orders heretofore entered herein in any way modifying or affecting the same are hereby interpreted and declared by the court with respect to the securities deposited by the debtor herein with the Treasurer of State of the State of Ohio for the benefit of contract holders, that the said Treasurer of State of the State of Ohio be not required by virtue of said orders to turn over physical possession of such securities

to the trustee of the debtor herein until such time as a plan for reorganization has been regularly adopted and approved by this court and approved by the creditors of the debtor under the provisions of Chapter 10 of the United States Bankruptcy Act.

Whereupon, said Don H. Ebright, Treasurer of State of the State of Ohio, withdraws his answer, petition and motion heretofore filed herein. Said Treasurer of State of the State of Ohio, however, reserves his respective status as an intervenor in these proceedings and his right to participate as such herein.

Entered this 29th day of October, 1941.

Ben Moore, United States District Judge.

(The Motion, referred to in the foregoing order, is in the words and figures as follows:)

[fol. 308] IN UNITED STATES DISTRICT COURT

[Title omitted.]

MOTION—Filed October 29, 1941

Now comes Don H. Ebright, Treasurer of State of the State of Ohio, and moves the Court for an order interpreting and declaring with respect to the turnover orders entered in this court on the 6th day of June, 1941, the 10th day of June, 1941, and the 9th day of August, 1941, and all orders heretofore entered herein in any way modifying or affecting the same so as to permit the Treasurer of the State of Ohio to retain physical possession of securities deposited with him for the benefit of contract holders until such time as a plan of reorganization has been regularly adopted and approved by the court and approved by the creditors under the provisions of Chapter 10 of the United States Bankruptcy Act.

(S.) Don H. Ebright, Treasurer of State of the State of Ohio. By Thomas J. Herbert, Attorney General. Dale Dunifon, First Assistant Attorney General. David M. Spriggs, Assistant Attorney General.

[fol. 309] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING DEBTOR'S PETITION, ETC.—January 5,  
1942

Upon the petition of the Debtor, Fidelity Assurance Association, praying for its reorganization under Chapter X of the Federal Bankruptcy Act, filed herein on June 6, 1941, and upon the answers of the intervenors, Edgar B. Sims, Auditor and ex officio Insurance Commissioner of the State of West Virginia, Ross B. Thomas and H. Isaiah Smith, Receivers appointed by the Circuit Court of Kanawha County, West Virginia, and upon the answers and pleadings of all other intervenors and creditors controverting the allegations of the petition of the Debtor, and upon the evidence introduced herein, and upon all papers filed and proceedings had herein, the Court is satisfied and doth find that the said petition complies with the requirements of Chapter X of the Federal Bankruptcy Act, that the material allegations of the said petition are sustained by the proofs and that the said petition has been filed in good faith, and now it is

Ordered that the said petition of the Debtor, Fidelity Assurance Association, praying for its reorganization under Chapter X of the Federal Bankruptcy Act, be and the same is hereby approved; and it is further

Ordered that the Court's findings of facts and conclusions of law are as set forth in the opinion of the Court, delivered in open Court January 3, 1942, and the said opinion be and the same is hereby made a part of the record in this proceeding as though fully set out herein; and it is further

Ordered that the motions of Edgar B. Sims, Auditor and ex-officio Insurance Commissioner of the State of West Virginia, Ross B. Thomas and H. Isaiah Smith, Receivers appointed by the Circuit Court of Kanawha County, West Virginia, and John B. Gontrum, Insurance Commissioner of Maryland, and of other intervenors to modify or rescind the orders of June 6, 1941, June 10, 1941 and August 9, 1941 be and the same are hereby overruled; and it is further.

Ordered that the transcript of testimony prepared by the court reporter and filed with the Clerk of this Court [fol. 310] is hereby made a part of the record of this case.

Enter:

Ben Moore, Judge.

January 5, 1942.

(The Opinion of the Court, referred to in the foregoing order, is in the words and figures as follows:)

[fol. 311] IN UNITED STATES DISTRICT COURT

In Proceedings for Corporate Reorganization

No. 4514

In the Matter of: FIDELITY ASSURANCE ASSOCIATION, Debtor

OPINION—Filed January 5, 1942

On June 6, 1941, Fidelity Assurance Association filed its petition under Chapter X of the Chandler Act, as debtor, praying for corporate reorganization. After an ex parte hearing, the court entered an order approving the petition, enjoining various persons including receivers theretofore appointed by State courts, both in and outside the State of West Virginia, from disposing of any of the property of the Debtor; appointing Central Trust Company of Charleston, West Virginia, as trustee for the Debtor, and requiring the receivers to turn over to the trustee all property of the Debtor in their hands. On June 10, 1941, the court further ordered all state officials, both in and outside the State of West Virginia, having in their possession, custody or control any of the Debtor's property, to deliver such property to the trustee, and on the same day the court fixed the 5th day of August, 1941, as the date for a plenary hearing on the Debtor's petition. Ross B. Thomas and H. Isaiah Smith, Receivers appointed by the Circuit Court of Kanawha County, West Virginia, delivered to the trustee under protest the property of the Debtor in their possession. The Ohio receiver turned over to the trustee without protest, the property of the Debtor in his possession.

Edgar B. Sims, Auditor and ex-officio Insurance Commissioner of the State of West Virginia, Ross B. Thomas

and H. Isaiah Smith, the West Virginia Receivers, and various other state court receivers and state depositaries of securities of the Debtor outside the State of West Virginia, as well as certain groups of creditors, were permitted to intervene and file answers controverting the allegations of Debtor's petition.

The hearing which began on August 5, 1941, was continued from time to time until the 19th day of October, 1941, during which time nearly 4,000 pages of testimony were taken and 123 exhibits filed, at the conclusion of which hearing the court heard the argument of counsel upon the questions at issue.

[fol. 312] During the course of the hearing, on August 9, 1941, the court entered an order modifying the orders of June 6, 1941, and June 10, 1941, so as to eliminate therefrom any requirement that property of the Debtor in possession, custody or control of any state official on April 11, 1941, should be turned over or delivered to the Debtor's trustee in this proceeding. The West Virginia Insurance Commissioner, the receivers appointed by the Circuit Court of Kanawha County, West Virginia, and the Insurance Commissioner of Maryland, who appeared specially for that purpose, filed motions that the orders of June 6, 1941, and June 10, 1941, be further modified by eliminating all injunctive provisions against them, respectively; on the ground, substantially, that the effect thereof is to subject sovereign states to suit contrary to the provisions of the Federal Constitution; and as to property already delivered by the receivers to the trustee, that the orders be rescinded and the trustee required to return such property.

The case is now submitted to the court upon the questions (1) whether Debtor's petition shall be approved or dismissed, (2) whether the injunction "freezing" deposits in the hands of state depositaries should be dissolved, and (3) whether the orders requiring receivers to turn over certain assets of the Debtor in their hands to the Central Trust Company as Trustee of the Debtor should be rescinded.

#### Statement of Facts

Debtor was incorporated under the laws of the State of West Virginia on April 26, 1911, under the name of Fidelity Investment & Loan Association. Its objects and purposes as set forth in its original charter were to engage



in a general brokerage business in securities, real estate and insurance; and for a period of approximately a year and one-half it carried on a general brokerage business. In November, 1912, it changed its name to Fidelity Investment Association and amended its charter so as to provide for conducting "the business of soliciting and receiving deposits and payments on any annuity contracts, certificates or annuity bonds." This charter amendment brought the company under the provisions of what is now Article 9 of Chapter 33 of the Code of West Virginia relating to [fol. 313] annuity contracts. Since the change of name and amendment of the charter in November, 1912, Debtor has been engaged solely in the business of selling its own securities in the form of investment contracts or bonds of various types and the investment of the funds received from purchasers of such contracts so as to provide for their payment at maturity, according to their terms, or for payment of specified cash values at various stages in the life of the individual contract, if required by the purchaser. If a purchaser paid all the installments of his contract to maturity, he received a net return on the money invested which ranged from 1.55% to 3.09%, depending on the type of contract. The cash values were so fixed that it was not until the purchaser had paid all of the first year's installments that his contract was given any cash value whatever. Thereafter it acquired a cash value which increased proportionately as the years passed; but the cash value did not equal the total amount paid in by the purchaser until the end of a period varying from six to nine years, again depending on the type of contract. Contracts were matured when monthly installments had been paid for a period of ten to eleven years with a subsequent waiting period of three to thirteen months. About the year 1934 Debtor began issuing a contract known as Series B contract, the sale of which from that time on constituted the major portion of Debtor's business. Series B contracts were issued and sold in two forms. One of these contained a provision commonly referred to as Section 6, by the terms of which it was agreed that the Debtor would protect the unpaid portion of those contracts containing Section 6 by procuring an insurance policy which would provide that the contract of any purchaser who died before the maturity of his contract and while the same was in good standing would be paid to maturity (or the commuted value of a

paid up contract would be paid to the purchaser's estate) without further payment of any monthly installments. The net return to the purchaser of this Series B contract containing Section 6, after allowing for the amounts deducted to pay the premiums on the insurance, was 1.55%.

While the various types of investment contracts sold by the Debtor differ in some respects, they are all alike in providing for monthly, semi-annual or annual payments of specified sums, of which a sufficient portion was to be set aside in a reserve fund which was to produce the sum required to pay the purchaser the amount of money agreed [fol. 314] upon in the contract. The earlier contracts contained no statement as to the basis of the reserve fund. Of the later contracts, some provided for reserves on a  $4\frac{1}{2}\%$  basis and some on a 4% basis. All provided that the reserve fund so set aside should "be invested in approved securities and deposited in trust as required by the laws of the State of West Virginia."

During the course of its history, the Debtor expanded its business to a point where it was conducting operations in no fewer than 29 states. Section 3 of Article 9 of Chapter 33 of the Code of West Virginia provides that companies such as the Debtor, as a condition to receiving a license to transact business in the State of West Virginia, must deposit with the state treasurer in trust for the benefit of its contract holders securities approved by the Insurance Commissioner of West Virginia, in the amount of \$100,000.00 "and, in addition to such deposit . . . shall maintain at all times a deposit with the State Treasurer . . . to an amount equal to the total amount" for which the corporation may be liable in cash to the holders of all contracts at any particular time. It is further provided that where other states require the corporation to make deposits therein to secure contract holders in such other states, the amount of deposits made in the other states may be deducted from the total amount required to be deposited with the Treasurer of the State of West Virginia. Some of the other states in which Debtor transacted business required deposits of securities to be made, while others did not. The other states requiring deposits were Wisconsin, Illinois, Ohio, Tennessee, Missouri, Maryland, Alabama, Delaware, Indiana, Iowa, Kansas, Kentucky, Pennsylvania and Virginia. The provisions

of the several state laws with reference to the amount of required deposits vary. For example, under the law of Wisconsin it is provided in effect that Debtor's outstanding contracts in that state may not exceed 90% of the value of the deposit required to be maintained in that State; while Maryland requires deposits in an amount at least equal to contract liabilities with a minimum of \$25,000.00, and Illinois requires the same with a minimum of \$50,000.00. Virginia requires a deposit of \$25,000.00, without regard to the amount of cash liabilities, of which Debtor [fol. 315] has outstanding in Virginia approximately \$550,000.00. The deposit provision of the Illinois law was enacted in 1931. Prior to that time no deposit was required in Illinois; but the Debtor had sold its contracts in that state and had substantial cash liabilities outstanding there. Consequently the deposits made by the Debtor with the State of Illinois never equalled the total cash liabilities in that state. Deposits of securities were made by the Debtor with the Treasury of the State of West Virginia to the total value, as of June 6, 1941, of more than \$10,000,000.00 on a market value basis, approximately \$12,000,000.00 on a "sound" value basis, and about \$14,000,000.00 on the basis of "book" value. At that time the total cash liabilities of the Debtor to West Virginia contract holders were approximately \$2,000,000.00. The excess above that figure, by the provisions of the West Virginia deposit statute, was for the protection of contract holders in states which required no deposit, as well as in states where the deposit was less than the total cash liabilities.

In each of the contracts sold by the Debtor there was a provision, which is set out in the respective contracts as Section 1 thereof, whereby, with slight variation in language as to each particular class or series of contracts, the Debtor agreed to create and maintain a reserve fund for such particular class or series from payments made on contracts of that particular class or series, which reserve fund was to be used for the discharge of its liabilities on that particular class or series of contracts. On its books Debtor kept these various series funds separate and distinct, but prior to December 31, 1938, it deposited cash received from payments on all the different series of contracts except Series "B" and Series "D" in one bank account. Payments on contracts in Series "B" and Series "D" were deposited in separate bank accounts from their inception.

At times when the reserve fund in one series was impaired by reason of withdrawals and maturities, so called "inter-fund" loans were made, of which exact records were kept and on which interest was charged to the borrowing fund and paid to the lending fund. In making the deposits with various state depositories, Debtor did not at all times designate deposited securities as being owned by particular funds, and made no attempt to proportion its deposits of securities from a particular fund to the amount of cash [fol. 316] liabilities against that fund in the state where the securities were deposited. It is contended by some of the parties to this proceeding that as a result of this method of doing business, each of the separate series funds is a trust fund for the benefit of the holders of contracts in that particular class or series, regardless of the provisions of the various state deposit laws, which might otherwise be applicable. A decision on this point is not necessary to a determination of the issues now being considered by the court, but the facts are set out, inasmuch as they were developed at the hearing.

In the period following the year 1929 occurred a great financial depression. The market value of securities fell substantially and Debtor's affairs became precarious, to say the least. When Auditor Sims took office in the year 1933 the entire assets of the company on a basis of market values were worth about \$7,000,000.00 less than the amount of its cash liabilities. Gradually, by reason of an investment policy which took advantage of market fluctuations in certain securities, together with a general improvement in market values, the Debtor's financial condition improved. At the time the petition was filed the market value of the Debtor's assets was approximately \$2,500,000.00 less than its cash liabilities.

On December 14, 1938, the Securities and Exchange Commission instituted an action against the Debtor in the District Court of the United States for the Eastern District of Michigan, Southern Division at Detroit, as a result of which, and by consent of the Debtor in open court, an injunction was entered against the Debtor and its principal officers enjoining certain practices in which the Debtor and its agents had theretofore engaged in connection with the sale of its investment contracts. Thereafter, and chiefly as a result of the Detroit proceedings,



certain contract holders brought suit in the United States District Court for the Northern District of West Virginia, praying for the appointment of a receiver for Debtor's property and assets on the theory that Debtor was at that time insolvent. The court adopted the view that "sound" values instead of market values should be used as a basis of appraising Debtor's solvency and held that Debtor on that basis was not insolvent, dismissing the proceeding. The Circuit Court of Appeals affirmed the District Court's decision. The publicity which resulted from the injunction [fol. 317] and the litigation in the Northern District of West Virginia caused a substantial loss of public confidence and was greatly detrimental to Debtor's business. However, Debtor continued to operate until the passage of the Investment Company Act in the fall of 1940, when it became apparent that Debtor could not continue to do business as in the past because it would be unable to comply with the conditions and provisions of that Act.

In this situation Debtor attempted to devise means of continuing its business on a reorganized basis. The officers and directors conceived the idea that it might be converted into an insurance company, retaining at the same time the power and right to issue annuity contracts as it had theretofore done, and that by a combination of life insurance features with the investment contracts, or by conversion of the contracts into life insurance policies or into annuities, Debtor might be able to continue to do business. Accordingly the charter was amended as of December 31, 1940, so as to provide that the corporate objects and purposes thereafter were "to issue insurance upon the lives of persons and every insurance appertaining thereto and connected therewith and to grant, purchase and dispose of annuities." Auditor Sims issued a license to the Debtor as so reorganized, but required of the Debtor that it do no soliciting by virtue of this license; so that the only business transacted by the Debtor after December 31, 1940, was the receiving of installment payments on contracts theretofore sold, paying off matured contracts and contracts presented for payment of their cash value, making loans on contracts and receiving payments thereon, and dealing with and managing the securities in its portfolio.

On April 4, 1941, Auditor Sims directed the Debtor to cease doing business of any kind and to "freeze" its assets



as of that date; that is, Debtor would continue to receive payments being sent in by purchasers of contracts, but it was ordered by Sims to segregate these payments and to apply none of them towards improvement of the contracts, neither was it permitted to make any further payments on matured contracts or upon any contract surrendered by a purchaser for its cash value, nor to make any further contract loans, nor to dispose of any securities held by the Debtor. One week later, on April 11, 1941, Auditor Sims, as Commissioner of Insurance, filed a bill in the Circuit Court of Kanawha County, West Virginia, pursuant to the [fol. 318] provisions of Section 45, Article 2, Chapter 33 of the Code of West Virginia, which section provides that such action may be taken by the Insurance Commissioner "for the purpose of taking possession of its (any insolvent investment company's) property in this State and the distribution of its assets among those entitled thereto according to their respective right." The Circuit Court of Kanawha County appointed Ross B. Thomas and H. Isaiah Smith as special receivers of the property and assets of the Debtor in West Virginia. These receivers took into their possession all tangible property of the Debtor in West Virginia and all its intangible property in West Virginia, except the securities which had been deposited by the Debtor with the State Treasurer under the provisions of Section 3 of Article 9, Chapter 33 of the Code of West Virginia, already referred to. The securities in the hands of the State Treasurer had a market value at that time of approximately \$10,000,000.00 and constituted more than 50% in market value of the total security deposits maintained by the Debtor in all states requiring deposits, and almost 50% of all assets of the Debtor.

After the appointment of the receivers by the Circuit Court of Kanawha County, West Virginia, most of the other states wherein the Debtor maintained deposits under the provisions of the applicable state laws began proceedings looking toward the liquidation of the deposits in those states. For the most part, these proceedings took the form of the appointment of receivers by the respective state courts under statutes similar in purpose to the West Virginia statute under which Auditor Sims had acted. No securities were actually sold, except in the State of Wisconsin, where the Banking Commission, acting under the

authority of a Circuit Court order, sold approximately \$1,250,000.00 of securities which had been deposited by the Debtor in that state, being about one-half the total deposit in Wisconsin.

At the annual stockholders' meeting of the Debtor in February, 1941, fourteen directors were elected, but six of these had declined to serve. On June 3, 1941, a purported meeting of the directors was held in Pittsburgh, Pennsylvania, at which meeting six of the eight directors who had been elected and who had consented to serve were present. There were Allen G. Messick, John Marshall, John Marshall, Jr., A. L. King, Howard E. Reed and F. H. Pulfer. [fol. 319] D. A. Burt and F. S. Risley, the other two of the eight directors who had consented to serve, were not present. The by-laws of the Debtor provide that seven directors shall constitute a quorum, and further that "vacancies in the board of directors not caused by removal by stockholders in gener meetings may be filled for the remainder of the term by vote of a majority of all of the directors in office. \* \* \*." James R. Fleming, a friend of John Marshall, Sr., was present when the six directors met in Pittsburgh, and these six directors proceeded to elect him as a seventh director for the purpose of establishing a quorum, he having announced his intention to resign from the board upon adjournment of that meeting. At this meeting in Pittsburgh a resolution was passed authorizing John Marshall, Jr., on behalf of the company to file the petition for corporate reorganization under Chapter X, which is the basis of this proceeding. The petition was filed by Fleming as attorney for the Debtor. The controverting answers filed challenge the validity of the Pittsburgh directors' meeting on the ground that a quorum was not present and on the further ground that several of the directors who were present were ineligible to serve as such, because of the fact that they had been enjoined in the Detroit proceeding. The Investment Company Act of 1940 provides (U. S. C. A. Title 13, §80 a-9) that it shall be unlawful for any person to serve as a director of a company who "by reason of any misconduct, is permanently or temporarily enjoined by order, judgment, or decree of any court," etc., from acting in various capacities in connection with the business of an investment company.

The validity of the directors' meeting of June 3, 1941, having been questioned, a subsequent directors' meeting was held on September 17, 1941, at which directors' meeting the minutes show the presence at the beginning of seven directors, namely, Allen G. Messick, John Marshall, John Marshall, Jr., Howard E. Reed, F. H. Pulfer, D. A. Burt and Wheeler Bachman. These directors elected Phil D. Paull to fill the place of A. L. King, resigned, and ratified and confirmed the action taken on June 3, 1941, authorizing the filing of the petition. The validity of this meeting is likewise questioned, both because Wheeler Bachman was present and acted as one of the seven directors, to make a quorum, he having previously in a letter to the Debtor [fol. 320] declined to act as a director, but no action having been taken thereon by the company, and because certain others of the directors are alleged to be disqualified by the aforesaid provisions of the Investment Company Act of 1940.

A third effort was made by the Debtor to validate the original action of the board on June 3, 1941, with reference to filing the petition. A meeting of stockholders was held on October 3, 1941. At this meeting a resolution was adopted by the stockholders ratifying the filing of the petition; vacancies in the offices of directors were filled; the by-laws were amended to provide for a quorum of five instead of seven; and a directors' meeting was thereupon held, at which thirteen members of the board as then constituted were present; and a similar resolution of ratification was unanimously adopted. Those present were: Allen G. Messick, F. H. Pulfer, John Marshall, John Marshall, Jr., D. A. Burt, Philip D. Paull, James Paull, F. S. Risley, W. L. Burt, Gordon Hobstetter, George Miller, H. Julian Ulrich, and H. C. Hazlett. Seven of the directors present at this last meeting were not affected by the provisions of the Investment Company Act of 1940 already referred to. Opponents of the petition object to the validity of the last mentioned stockholders' and directors' meetings on the ground that John Marshall, Sr., was permitted to vote the majority of the stock of the company at the stockholders' meeting, pursuant to a voting trust agreement which was originally entered into in connection with some refinancing efforts made by the company which failed of their purpose; and it is contended that the owners of the stock should have been permitted to vote it at the stockholders' meet-

ing. Objection is also made that the court abused its discretion in consenting, prior to the meeting of stockholders and directors, that certain persons should be elected as officers of the company who, it is alleged, are still subject to disqualification, because of the Detroit injunction.

Shortly after the petition was filed, the trustee petitioned the court for authority to employ Allen G. Messick and James R. Fleming to assist the trustee in certain matters in which interested persons might be employed under the provisions of Chapter X. The court at first authorized [fol. 321] such employment, but later, being of opinion that it would not be for the best interests of all parties concerned, revoked such authority and Messick and Fleming were never actually employed by the trustee. Opponents of the petition contend that the acts of John Marshall, Sr., Allen G. Messick and James R. Fleming, all of whom participated in the directors' meeting of June 3, 1941, which authorized the filing of the petition, together with other circumstances developed at the hearing, show a lack of good faith independently of the statutory standards set out in Section 146 of Chapter X.

The arguments, therefore, which are advanced by opponents of the petition are, first, that the debtor is an insurance company and therefore ineligible to file a petition for reorganization under Chapter X; secondly, that no valid authority was given for the filing of such petitions; thirdly, that the securities in the hands of the State Treasurer of West Virginia, amounting to approximately Ten Million Dollars in market value, are not assets of the Debtor within the meaning of the venue provision of Chapter X and that since no other assets of the Debtor are within the territorial jurisdiction of this court, this was not the proper venue for the filing of the petition; and fourthly, that the petition of the Debtor was not filed in good faith, either within the ordinarily accepted meaning of the term, or within the restrictions set out in Section 146 of Chapter X; and that under the provisions of Section 146 it is unreasonable to expect that a plan of reorganization can be effected; and that the prior proceeding in the Circuit Court of Kanawha County, West Virginia, would best subserve the interests of creditors and stockholders. It is further contended as bearing on the unreasonableness of any expectation that a plan of reorganization can be effected, that even though this court should be held to have both juris-



diction and venue of the proceeding as such, still it would lack authority by reason of the 10th and 11th amendments to the constitution of the United States to enter any order against any of the state depositaries having in their possession securities deposited by the Debtor, as well as against the Kanawha County Circuit Court receivers, who, it is alleged, are merely agents of Auditor Sims; and further that the deposits made by the Debtor with various state depositaries constitute contracts in the public authority which the court may not reject or interfere with; and that lacking such authority the court could not possibly provide [fol. 322] for the carrying out of any effective plan of reorganization. I will now proceed to examine these arguments.

### Conclusions of Law

Is the Debtor an insurance company?

It is contended by opponents of the petition that even prior to December 31, 1940, the nature of the Debtor's business was such that it should be denominated an insurance corporation within the meaning of Section 4 of Chapter III of the Bankruptcy Act, which is also applicable to Chapter X; and further, that upon amendment of its charter on December 31, 1940, it became an insurance company, both in name and in fact, and was therefore ineligible to file a petition for reorganization under Chapter X. I am of opinion that prior to the charter amendment of December 31, 1940, Debtor's business had none of the distinguishing features which characterize an insurance company. Originally it was organized as a brokerage company to deal as a broker in securities, real estate and insurance. When its charter was first amended in November, 1912, it was for the purpose of enabling it, as stated in the charter amendment, to engage in "the business of soliciting and receiving deposits and payments on any annuity contracts, certificates or annuity bonds." The contracts which it sold throughout its subsequent existence until it ceased selling any contracts whatever were not insurance annuity contracts. They were investment annuity contracts. An essential element of any insurance contract is that the insurer, as one of the conditions of the contract and as consideration, at least in part, for the periodical payment of premiums, assumes some risk of being required to pay the beneficiary a larger sum of money than the amount, with



interest, paid in. In life insurance this risk takes the form of an agreement to pay a sum of money, contingent upon the death of the person insured; in accident insurance, upon the happening of an accident to the person insured; in title insurance, upon suffering of a loss by the person insured from defective title; in marine insurance, upon loss of an insured cargo, etc., *Howard Fire Insurance Company v. Chase*, 72 U. S. (5 Wall) 509, 18 L. Ed. 524; *Ogilvie v. Knox Insurance Company*, 63 U. S. (22 How.) 380, 16 L. Ed. 349. In none of Debtor's contracts did Debtor assume any such risk, or, in fact, any risk. Even in the Series B contracts [fol. 323] with the insurance provisions, it is quite clear that Debtor itself assumed no risk, but merely agreed to keep those contracts insured as to unpaid installments, which it did by procuring an insurance policy from the Lincoln National Life Insurance Company. Clearly, Debtor was an investment company and not an insurance company prior to December 31, 1940.

By the charter amendment of December 31, 1940, Debtor became empowered (subject to the licensing authority of the State of West Virginia) both the issue life insurance contracts and to grant, purchase and dispose of annuities. In view of the fact that this charter amendment was a step in an attempted reorganization of Debtor's business and that it had outstanding at that time many thousands of the investment annuity contracts described in its first charter amendment as "annuity contracts, certificates or annuity bonds," I am of opinion that the term "annuities" as used in the 1940 charter amendment referred to the same kind of investment annuity contracts which were then outstanding. In order that Debtor might entertain any reasonable hope of reorganization, it was necessary that it continue to enjoy the power to "purchase and dispose of annuities"; whether such annuities were to be those already outstanding or annuities afterwards sold. True, Debtor's directors had decided that it could not continue business in the same manner as in the past, because it could not qualify under the Investment Company Act of 1940; but they hoped that by a combination of its business in investment annuity contracts with a life insurance business, the company might continue to operate. The precise plan of operation had not been determined upon at the time the Debtor was placed in receivership in the Circuit Court of Kanawha County, West Virginia, on April 11, 1941.

In deciding whether a corporation is to be classified as an insurance or banking corporation or a building and loan association within the meaning of the Bankruptcy Act, the court must first examine the provisions of its corporate charter. If the charter authorizes the company to engage in business in any of the excepted fields, and if the company in fact engages principally in a business which lies within that field, such a corporation must be treated as one excluded from the benefits of Chapter X. However, if its charter authorizes the corporation to engage in activities [fol. 324] outside the excepted fields, and if all the business actually done by the corporation is outside those fields, then it must be treated as not being within any of the excluded classes. By this test Debtor must be classified as a corporation which is not an insurance corporation within the meaning of the exemption provisions of the Bankruptcy Act. It is a corporation which is entitled to the benefits of Chapter X, and it had the right to file a petition for corporate reorganization. *In re: Supreme Lodge of Masons Annuity*, 286 F. 180; *In Re: Wisconsin Co-operative Milk Pool*, 35 F. Supp., 787; *In Re: Prudence Company*, 79 F. (2d) 77 (2 C. C. A., 1935); *Finletter, The Law of Bankruptcy Reorganization*, -1939) p. 107; *Capitol End. Co. v. Kroeger*, 86 F. (2d) 976, 979 (6 C. C. A. 1936).

Was the petition which Debtor filed on June 6, 1941, properly authorized?

The directors' meeting in Pittsburgh, held on June 3, 1941, at which meeting John Marshall, Jr., was authorized by resolution to file the petition for corporate reorganization, was attended by only six directors. The by-laws of the Debtor specify that seven directors are required to constitute a quorum. Eight of the directors elected at the annual meeting had consented to serve. It is clear that the directors' meeting in Pittsburgh was held without a quorum. The fact that the six directors who were present elected a seventh to complete the quorum does not change the situation. If a valid meeting could be held by six directors, there is no reason why it could not be held by any other number less than a quorum. Such procedure, if given the sanction of the court, would render nugatory the provision of the by-laws with reference to a quorum. The purported directors' meeting of June 3, 1941, was not a legal meeting and the directors could not at that meeting grant

any valid authority to any person to file the petition for reorganization. *Lawrence, et al. v. Montgomery Gas Company*, 88 W. Va., 352, 106 S. E. 890. Unless it can be said that the defective proceedings and the act of Marshall pursuant thereto in filing the petition were afterwards properly ratified by the Debtor, they established no basis for this proceeding.

On September 17, 1941, another directors' meeting was held in Charleston, West Virginia, at which meeting were [fol. 325] present seven of the persons who had been elected as directors of the Debtor at the annual meeting held in February, 1941. One of these persons, namely, Wheeler Bachman, had previously written a letter to the corporation declining to serve as a director, but no action had been taken thereon by the corporation. It is an elementary principle of law that one who resigns an office may recall or revoke his resignation at any time before it is accepted. It is not shown that Bachman ever formally resigned; but if we treat his letter as a resignation, his attendance at the directors' meeting of September 17, 1941, and his participation therein are sufficient evidence of his intention to revoke such resignation. He had the right to claim his office as director, at least when no other director objected, and his acts as such were valid. One objection to the validity of the directors' meeting of September 17, 1941, as well as to that of the prior meeting of June 3, 1941, is that certain of the directors were disqualified because the injunction which had been granted against them in December, 1938, was still in effect, and because the Investment Company Act of 1940 makes it unlawful for any person to serve as a director of a company who "by reason of any misconduct" is enjoined from acting in certain capacities covered by the 1938 injunction. I am of opinion that the fact that certain of these directors may have violated the law in serving as such directors would not render their acts as directors invalid. Moreover, all of the directors who were enjoined had filed applications for exemption with the Securities and Exchange Commission, as provided for in the Investment Company Act of 1940; and while exemptions had not been granted, neither had they been denied, and these persons had been serving as officers and directors of the Debtor with the knowledge of the Securities and Exchange Commission and without objection. There could have been no valid ac-

tion on the part of the directors of the Debtor without the participation of at least some of these allegedly disqualified persons, since their exclusion from participation would have reduced the number of directors below the number necessary for a quorum. I am of opinion that the directors' meeting of September 17, 1941, was valid. In view of that conclusion, it is unnecessary to consider the question of the validity of the meeting of stockholders and directors subsequently held on October 3, 1941; but I may properly [fol. 326] say in passing that the October 3rd meetings were in all respects legal. Any act which directors have power to do may be subsequently ratified, if performed in the first instance without authority. *Helvering v. J. L. Brandeis & Sons*, 75 F. (2d) 487 (8 C. C. A. 1935). It follows that the filing of the petition for corporate reorganization, though originally not properly authorized, was afterwards duly ratified, and such ratification was effective as of the date of the original act of authorization.

Is the Southern District of West Virginia the proper territorial jurisdiction for the filing of Debtor's petition for corporate reorganization?

Section 128 of Chapter X of the Bankruptcy Act provides that an "original petition may be filed with the court in whose territorial jurisdiction the corporation has had its principal place of business or its principal assets for the preceding six months or for a longer portion of the preceding six months than in any other jurisdiction." The principal place of business of the Debtor is located in Wheeling, a city in the Northern District of West Virginia. Therefore, unless it can be said that the Debtor had its principal assets in the territorial jurisdiction of the Southern District of West Virginia for a longer portion of the six months next preceding June 6, 1941, than in any other jurisdiction, the petition must be dismissed.

It is undisputed that the securities in the hands of the Treasurer of the State of West Virginia at Charleston, in the Southern District, are of greater value than the securities deposited by Debtor in any or all other states. It is likewise undisputed that virtually all of Debtor's "free" assets, that is, tangible real and personal property and securities not in the hands of any state depository, were located in the Northern District of West Virginia during the greater portion of the six months preceding June 6,



1941. The only question to be decided, then, insofar as this phase of the inquiry goes, is whether or not the securities in the hands of the Treasurer of the State of West Virginia are assets of the Debtor within the meaning of Section 128 of Chapter X.

It is contended by opponents of the petition that the doctrine of *mobilia sequuntur personam* is applicable to the securities in the hands of the State Treasurer, and that [fol. 327] since Debtor has its principal office in the Northern District of West Virginia, these securities, being intangibles, have their legal situs in the same place. The doctrine of *mobilia sequuntur personam* is a legal fiction. Like all such fictions, it originated from necessity. Its use is limited to those cases in which it is necessary that the doctrine be invoked in order to accomplish some beneficial result and in which, without means of the doctrine, some proper governmental, legal or equitable principle would fail of application. In the absence of such necessity the situs depends upon power of control. The securities in the hands of the State Treasurer are chiefly bonds and certificates of stock. These documents are themselves chattels. Possession thereof gives the court within whose territorial jurisdiction the possession is held power of control over the debt or property right represented by them. *In Re: Berthoud*, 231 Fed. 529 (S. D. N. Y. 1916); *1 Gerdes, Corporate Reorganization*, Section 69.

In addition to the contention that the situs of Debtor's intangible property is in the Northern District of West Virginia, it is further argued by opponents of the petition that the securities deposited with the State Treasurer at Charleston are not assets of the Debtor at all. They say that when these securities were deposited, the State of West Virginia became vested with the legal title thereto, and that when Auditor Sims determined on April 4, 1941, that the Debtor was insolvent, or, at the latest when the receivers were appointed by the Circuit Court of Kanawha County, West Virginia, the entire beneficial interest in these securities became vested in the holders of contracts secured thereby and that thereafter the Debtor had no interest of any nature in the securities. I find no provision in any of the pertinent West Virginia statutes which gives to the State Auditor (Insurance Commissioner) or to the State of West Virginia itself any further interest in the deposited



securities than that (1) if the Insurance Commissioner shall be of opinion that the assets of the depositing company are impaired or that it is not complying with the law, he is given authority to revoke its license and to retain the deposits under his authority and control until the total liabilities of the company in the State of West Virginia are redeemed or settled and (2) if the company shall become insolvent, the Commissioner of Insurance is authorized to file a bill in the Circuit Court of Kanawha County for the administering of its assets and the distribution thereof [fol. 328] among those entitled thereto according to their respective right. The language used in the applicable statutes (Code of West Virginia, Chapter 33, Article 9, Section 10; Michie Section 3455, Chapter 33, Article 2, Section 45; Michie Section 3325 (1)) indicates that the legislature intended the deposited securities to be deemed and treated as assets of the company; for in referring to impairment of *assets* and administering of *assets*, it is clear that the legislature meant to include the deposited securities, since under the law these at all times constituted the bulk of the property liable for the company's debts. The mere bringing of a suit and the appointment of receivers do not divest an insolvent corporation of its interest in property which up to that time it owned. The corporation still has an interest in the property to see that it is properly applied in satisfaction of its obligations; and it has the further right to receive whatever portion of the property may remain after all the obligations are satisfied. Such right is not affected by the fact that at the time receivership proceedings were instituted the corporation was insolvent. It is always possible that between the date of the appointment of receivers and the date of the court's final decree of distribution a change in values may produce a surplus over and above the claims of creditors. Auditor Sims testified that the market value of Debtor's securities increased nearly five million dollars between 1933 and 1941, due in part to rising markets; and it is shown by other testimony that the market value of the securities increased substantially between the date the state receivers were appointed and the date of the hearing. It is also possible, and perhaps probable, in this case, since there are approximately 80,000 creditors, that their proved claims may

amount to a total sum substantially less than that shown by Debtor's books of account.

The fact that stockholders of the Debtor had no interest in the assets is immaterial. The test is whether or not the assets may be applied in payment of the Debtor's obligations. *In Re: Central Funding Corporation*, 75 F. (2d), 256 (C. C. A. (2d) 1935); *In Re: Mortgage Securities Corporation*, 75 F. (2d) 261, (C. C. A. (2d) 1935.)

The securities deposited with the Treasurer of the State of West Virginia are liable for the payment of Debtor's obligations. Clearly they are assets of the Debtor within the meaning of Section 128 of Chapter X.

[fol. 329] Was the petition filed in good faith?

Section 146 of Chapter X of the Bankruptcy Act provides that a petition shall be deemed not to be filed in good faith if "(1) the petitioning creditors have acquired their claims for the purpose of filing the petition; or (2) adequate relief would be obtainable by a debtor's petition under the provisions of Chapter XI of this Act; or (3) it is unreasonable to expect that a plan of reorganization can be effected; or (4) a prior proceeding is pending in any court and it appears that the interest of creditors and stockholders would be best subserved in such prior proceeding." Subsections (1) and (2) are not applicable. The greater part of the voluminous testimony taken in the hearing was in relation to Subsection (3). The principal contentions of opponents of the petition are; that the Fidelity plan is fundamentally unsound; that its past history shows that it cannot be operated profitably; that the Investment Company Act of 1940 has made it impossible to operate the Fidelity plan in the future; that the unfavorable publicity which has attended Fidelity's operations during the past three years, including that incident to the present litigation, has created among Fidelity's contract holders a feeling unfavorable to any future operation of the company; and that the various states, if deprived of their asserted right of control over the deposits made therein, respectively, would not be friendly to future operations in those states. I will consider these contentions in the order stated.

The proceedings are not yet at a stage where the court is called upon to consider any particular plan of reorganization. It is true that the broad picture developed by the testimony at the hearing does not present a very favorable view with respect to the rehabilitation and continued opera-

tion of the Debtor as a face amount certificate company. Whether the Fidelity plan is fundamentally unsound depends upon the definition given to the term. It is apparent that it is a plan of investment which yields a very low rate of income to the investor and subjects the investor to substantial loss should he cease to pay the required installments during the earlier stages of the contract; but this very element of weakness from the investor's standpoint strengthens the company from an operating viewpoint, provided the contracts can be sold in sufficient volume to take care of necessary overhead expenses. It is extremely doubtful whether, in view of unsettled economic conditions and the critical international situation, the Fidelity plan would any longer appeal to a large public; but it is not impossible; and it is not the duty of the court to decide for the public that investors will not or should not buy these contracts in the future.

The fact that the company has not been operated profitably in the past is not shown to be the result of financial unsoundness in the plan itself. It has been due rather to an unsoundness in Debtor's methods of management. Extravagant sales and promotion expenses; useless expenditures for lavish offices, including the home office building at Wheeling, West Virginia; overexpansion, particularly in states like Wisconsin, where the strictness of regulatory state laws made it impossible to operate at a profit; poor judgment in selection of the personnel to manage the company: these are the elements of unsoundness which have brought about the difficulties in which Debtor now finds itself.

The requirements of the Investment Company Act of 1940, establishing 7% of the total amounts paid in on contracts during their entire life as the maximum loading charge, are calculated to make the contracts more saleable, and, with proper economy and good judgment on the part of the management, a reasonable profit to the operating company is possible. This regulatory law has not had the effect of banishing all such companies from the region of commercial operation. The testimony discloses that at least one other such company is still in operation, presumably with some measure of success.

To conclude that unfavorable publicity concerning the affairs of any company must affect that company's prospects of future operation after being reorganized under

Chapter X is to lose sight of the very purpose of such a reorganization. All the unfavorable publicity has been directed towards the unreorganized company. What I have said above concerning the reasons for the company's present financial condition indicates that in my opinion such unfavorable publicity has been amply justified; but it does not follow that if and when the company may be reorganized under the supervision of a United States Court it [fol. 331] would retain any of the stigmata which it is the purpose of such reorganization to remove.

As to the argument that the several states where Debtor has sold contracts would be unfriendly to future operations of a reorganized company therein, it is sufficient to say that this argument imputes to the governments of those states unworthy motives for future action—motives which no court should assume would be entertained. Certainly if any reorganized company should seek permission to do business in these states, it would be required to comply with the state laws. It could do no less. It should not be expected to do more.

The Debtor is insolvent, on the basis of market values, to the extent of approximately 10%; that is, its liabilities exceed its assets by that figure. This fact furnishes no basis for concluding that it is unreasonable to expect that a plan of reorganization can be effected. One of the essential allegations in a petition for reorganization is "that the corporation is insolvent or unable to pay its debts as they mature." Section 130, Chapter X, Bankruptcy Act. The stockholders may be entirely excluded from the reorganization. *Case v. Los Angeles Lumber Products Company*, 308 U. S. 106.

It is not necessary that there be a reasonable prospect for the successful rehabilitation of the Debtor as a going or continuing corporation. It is sufficient if it is shown that the Debtor is in a position to conform to and obtain the benefits of the statute for a slow, beneficial and orderly liquidation. *R. L. Witters Associates, Inc. v. Ebsary Gypsum Co., Inc., et al.*, 93 F. (2d) 746 (C. C. A. 5th 1938); *Re Central Funding Corporation*, 75 F. (2d) 256 (C. C. A. 2d 1935); *In Re: Mortgage Securities Corporation*, 75 F. (2d) 261 (C. C. A. 2d 1935). The character of Debtor's assets is such that it would be peculiarly beneficial in its case to obtain slow and orderly liquidation, if such should be found to be the only feasible plan. The dumping upon the market of twenty mil-



lion dollars worth of securities of the kind held in Debtor's portfolio would most certainly result in substantial losses, which may be avoided by slow and careful liquidation over an extended period of time. The possibility must also be considered that some of the Debtor's outstanding contracts may be found to be secured to the extent of their full cash [fol. 332] value, while others may be found to have less security, and therefore it may be practicable to liquidate the different contracts in different ways and by different methods, or to liquidate some and to effect a continuing reorganization as to others.

The argument that the receivership proceeding pending in the Circuit Court of Kanawha County is one in which the interests of creditors and stockholders would be best subserved, was vigorously urged. Its fallacy is patent. I shall, however, devote some space to its consideration. To say that a court which has jurisdiction only within the bounds of the State of West Virginia could properly deal with assets located in twenty-nine different states is, in my opinion, absurd. Even as to the assets in West Virginia, it is contended by Auditor Sims that the receivers appointed by the Circuit Court of Kanawha County are merely his agents, and that the only assets really under their independent control are a few hundred thousand dollars in value of free securities, real estate and tangible personal property. I am further impressed by the fact that whereas the total securities deposited in West Virginia are valued in the market at approximately ten million dollars, the total outstanding contracts in West Virginia represent only approximately two million dollars in cash liabilities. If administration of these securities were left in the control of the West Virginia state court or of the State Auditor, an inequitable situation would result. The state court or State Auditor would be vested with power to administer eight million dollars worth of securities deposited in West Virginia to secure cash liabilities in other states where there is no law requiring deposits and where deposits do not equal liabilities, and at the same time would be without power or control over any of the deposits in those other states where deposits have been made and maintained.

There is another reason why the receivership proceeding in the Circuit Court of Kanawha County is not conducive to the best interests of creditors. One of the receivers appointed by that court is an attorney connected with the law



firm of Koontz & Koontz. The firm of Koontz & Koontz represents the receivers, both in the Circuit Court of Kanawha County and in the litigation in this court. Arthur B. Koontz, senior partner in the firm of Koontz & Koontz, was for many years a director of the Debtor, and as such [fol. 333] was closely associated with its affairs and with the other members of its board of directors during this years of service as a director. It is not improbable that investigation into Debtor's affairs may disclose the existence of liability from some or all of the directors to Debtor's creditors. Is it reasonable to suppose that such liabilities, if any, would be diligently sought out and pursued in a proceeding with which one of Debtor's directors is so closely associated? The question answers itself. I have no criticism of the action of the Circuit Court of Kanawha County in appointing the receivers who were appointed. Doubtless that court, not being bound by the prohibitions of Chapter X with reference to appointment of interested persons, acted as seemed best to that court under the pleadings and evidence presented to it. I must decide the questions presented here in the light of all the facts and circumstances in connection with the state court receivership, which circumstances I deem to be of some weight in deciding whether the best interests of creditors would be subserved in the prior proceeding. I am of opinion that they would not be best subserved.

It is further argued that under the general meaning of the term "good faith" the Debtor did not in fact exercise good faith in filing the petition for corporate reorganization. By lack of good faith in proceedings such as this it is ordinarily meant that the petition, if filed by creditors, is filed for the purpose of harassing or embarrassing the Debtor, and if filed by the Debtor, is filed for the purpose of hindering, delaying or defrauding creditors. When subjected to this test, I can perceive no substantial basis for the contention that the petition was not filed in good faith. It was calculated to bring about a result which would not only not hinder, delay or defraud the creditors, but which would benefit them by removing the litigation from numerous state court proceedings, wherein Debtor's assets might reasonably be expected to be largely dissipated in costs, fees, and market losses by forced liquidation, to a forum where, under the broad and salutary provisions of Chapter X of the Bankruptcy Act, its assets may be conserved and

its financial structure reorganized and rehabilitated, if a feasible plan can be devised. The fact that some stockholder or director may have been motivated by the hope [fol. 334] that he might preserve for the future some connection with the affairs of the company is not in itself proof of bad faith. The evidence shows that the directors who participated in the proceedings to authorize the filing of the petition entertained the bona fide belief, at the time they voted in favor of the resolution authorizing the petition to be filed, that it was only by proceeding under Chapter X in a United States Court that Debtor could reasonably hope to obtain any practical results by way of corporate reorganization.

I am satisfied that the petition complies with the requirements of Chapter X of the Bankruptcy Act, and has been filed in good faith.

Does the Eleventh Amendment to the Constitution of the United States limit the power of this court with reference to the securities deposited with the several state depositaries?

It is urged that insofar as the present proceeding requires the court to act with reference to securities deposited with state officials and now in their hands, it is to that extent a suit against the state and therefore within the prohibition of the Eleventh Amendment. It is further contended by Auditor Sims that the receivers appointed by the Circuit Court of Kanawha County are merely his agents and that therefore the same constitutional prohibition applies to a suit against them as he alleges with respect to the suit against him. I may dispose of the latter contention summarily by saying that I know of no principle of law or equity, nor has any such been cited to me, whereby an ordinary equity receiver appointed by a Circuit Court under a general statute can be treated in any other capacity than as an officer of the court appointing him. The fact that a statute of the State of West Virginia requires that before receivers of insolvent insurance (and perhaps, by implication, investment) companies may present their report to the court for confirmation, they must first submit it to the Insurance Commissioner (W. Va. Code, Chapter 33, Article 2, Section 36, Michie's Code of 1937, Section 3317) can have no bearing on the question of the receivers' status in this case. It is always necessary and essential that the court exercise its authority and discretion in acting upon

receivers' reports, whether such reports are approved by the Insurance Commissioner or not.

In deciding the more substantial question of whether or [fol. 335] not this phase of the proceeding should be deemed a suit against the states which hold deposits, I am impressed by the fact that here the state is only a nominal and not a real party in interest. As I have already pointed out in an earlier part of this opinion the assets deposited with the states remain assets of the Debtor and the maximum extent of the interest of the states in those deposits is that they be held in custody until the liabilities of the Debtor are redeemed or settled. Compliance with any decree which may be entered by this court in this proceeding will not require the doing of any affirmative act which affects the states' political or property rights. The result of this litigation will neither inure to the benefit of, nor impose any liability upon any state. The real parties in interest are the Fidelity contract holders and the Debtor itself. It is with respect to the contract holders, (the creditors) that any decree entered by this court will effectively operate. The general governmental interest of a state in the welfare of its citizens in compelling obedience to the orders of its officials and securing compliance with its laws is not such as to make it a party in interest in this litigation. *Morrill v. American Reserve Bond Company*, 151 Fed. 305 (C. C. W. D. Mo. 1907); *Porter v. Beha*, 12 F. (2d) 513 (2 C. C. A. 1926); *Hobbs v. Occidental Life Insurance Company*, 87 F. (2d) 380 (10 C. C. A. 1937).

Is the order of this court with reference to securities in the hands of a state as a depositary violative of the Tenth Amendment to the Constitution of the United States?

It is argued that the state statutes regulating investment companies were enacted under the police power of the states and that insofar as Chapter X of the Bankruptcy Act purports to give to a Federal court the power to enter a decree in conflict with these state laws, it violates the Tenth Amendment and is therefore to that extent inoperative.

It is well settled that Chapter X providing for corporate reorganization is within the bankruptcy power granted to the Federal Government by the Constitution. For a time in recent years the question of whether the Tenth Amendment is a limitation upon the powers of Congress was not clearly answered by the courts; but since the decision in

*U. S. v. Darby Lumber Company*, 312 U. S. 100; 61 S. Ct. 451; 85 L. Ed. 395, there can be no doubt as to the answer. In that case the present Chief Justice said: "Our conclusion [fol. 336] is unaffected by the Tenth Amendment . . . . The amendment states but a truism that all is retained that has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers . . . ."

"From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." See the Article "*The Tenth Amendment Retires*," in *American Bar Association Journal*, April, 1941.

As I have already pointed out, the only respect in which the state statutes can be said to conflict with the Bankruptcy Act is that they give to state officials the right to retain custody of the deposits until final settlement or redemption of Debtor's liabilities. If such provisions are in conflict with Chapter X of the Bankruptcy Act (a question which I do not deem it necessary to decide at this time), *In Re: Bajardi*, 9 F. (2d) 797 (2 C. C. A. 1926), the provisions of the Bankruptcy Act must be held to be "paramount to any state statute the effect of which may impair or emasculate them." (*In Re: Coney Island Hotel Corporation*, 9 F. Supp. 329 (E. D. N. Y. 1934); *Everard's Breweries v. Day*, 265 U. S. 545, 558; *U. S. v. Darby Lumber Co.*, *Supra*).

On the remaining question of whether the deposits made with state officials are "contracts in the public authority," I think it is sufficient to say that in my opinion that phrase as used in Chapter X of the Bankruptcy Act has no application to the circumstances here presented. Moreover, this proceeding need involve no disaffirmance or rejection of any such contracts, if contracts they be. The deposits with the states are held subject to the order of a court of competent jurisdiction. Certainly this court as such will give effect



to whatever contractual rights may exist. It will be time to object if and when this court shall enter any decree which [fols. 337-338] may operate as a rejection of any so called "contracts in the public authority."

The various state officials holding Debtor's deposits, and *a fortiori* the receivers, are not adverse claimants. The argument to the contrary is unsubstantial and without merit. The deposits are held as security for the payment of claims of Debtor's contract holders. Debtor has never been divested by any kind of foreclosure proceedings of its residual interest in the deposits. They are not adversely held. No plenary suit is required in dealing with them. The assertion of adverse claims, being merely assertion and no more, may be disposed of summarily, as I have done. *Gamble v. Daniel*, 39 F. (2d) 447 (8 C. C. A. 1930-; *In Re; Faour, et al.*, 72 F. (2d) 719 (2 C. C. A. 1934); *Hobbs v. Occidental Life Insurance Co., Supra*; *Continental Illinois National Bank & Trust Company v. Chicago, R. I. & P. R. Co.*, 294 U. S. (1935) 648; *Miles v. New South B. & L. Assn.*, 95 Fed. 919 (C. C. A. D. Ga. 1899).

The conclusion is that the motions for dissolution of the injunction "freezing" the deposits in the hands of state depositaries and for rescinding the orders directing state receivers to turn over to the trustee assets of the Debtor in their hands are overruled and the Debtor's petition for corporate reorganization filed on June 6, 1941, is approved.

An order may be entered in accordance with this opinion.

(Signed) Ben Moore, District Judge.

December 24, 1941.

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[fol. 339] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO AMEND FINDINGS AND MAKE ADDITIONAL FINDINGS,  
AND AMEND THE JUDGMENT ACCORDINGLY—Filed January  
14, 1942

Comes now Edgar B. Sims, Auditor, etc., of the State of West Virginia, and H. Isaiah Smith and Ross B. Thomas, this 14th day of January, 1942, and within ten days after the entry of judgment in the above case, and in accordance with Rules of Civil Procedure, Rule 52(b), move the Court

that the findings made by it in its written opinion in the above case be amended in the following particulars, and the judgment accordingly amended:

1. On page 4, the Court stated "• • • under the provisions of what is now Article 9 of Chapter 33 of the Code of West Virginia • • •", and it should be "• • • under the provisions of what was Article 9 of Chapter 33 of the Code of West Virginia until that article was abolished by the 1941 session of the Legislature of West Virginia, Chapter 46, Section 12, passed March 8, 1941, in effect ninety days from passage • • •".

2. On page 5, the Court stated "• • • a sufficient portion was to be set aside in a reserve fund which was to produce the sum required to pay • • •" and it should be "• • • a sufficient portion was to be set aside in the reserve fund, which improved at a specified rate of interest at specified intervals, was to produce the sum required to pay • • •".

3. On page 5, the Court also stated "• • • some provided for reserves on a  $4\frac{1}{2}\%$  basis and some on a 4% basis," and it should be "• • • some provided that the reserves be improved on a  $4\frac{1}{2}\%$  basis and some on a 4% basis."

4. On page 5, the Court stated "• • • must deposit with the state treasurer in trust for the benefit of • • •", and it should read "• • • must deposit with the state treasurer (in accordance with Article 5, Chapter 12, of the Code) in trust for the benefit of • • •".

5. On page 12, the Court stated "• • • most of the other states • • • began proceedings looking toward the liquidation of the deposits in those states • • •" and it should be "• • • most of the other states • • • re-[fol. 340] ceived a telegram from Auditor Sims of West Virginia advising them of the action he had taken in Kanawha County, West Virginia, and asking them to institute similar proceedings under their laws, looking toward the freezing of the assets of Fidelity under legal protection until it could be determined by Auditor Sims, in conjunction with the proper state officials of other states, whether reorganization was feasible or whether liquidation would be necessary • • •".

6. On page 14, the Court, in listing the directors present at the meeting of October 3, 1941, lists one H. C. Hazlett, whereas it is believed it should be A. C. Hazlett.

7. The Court, on page 14, after listing the names of the directors present at the meeting of October 3, 1941, states: "Seven of the directors present at this last meeting were not affected by the provisions of the Investment Company Act of 1940 already referred to." It is submitted that the Court erred in this statement. F. H. Pulfer was an officer and employee at the time of the Detroit injunction; Philip D. Paull was a minor official and employee at that time; John Marshall and John Marshall, Jr., were both officers and directors at that time; D. A. Burt was a director at that time; Gordon Hoystetter was an employee at that time; F. S. Risley was a director and officer at the time; leaving only Allen G. Messick, James Paull, W. L. Burt, George Miller, H. Julian Ulrich and H. C. Hazlett.

The stock records of Fidelity Assurance Association show that A. C. Hazlett, as well as H. C. Hazlett, did not own any stock, either preferred or common, on either September 17th or October 3rd or October 10th, 1941, and thereby the said A. C. Hazlett, or H. C. Hazlett, never properly qualified as a director, in that he never became a stockholder within one week after his election.

H. Julian Ulrich, a neighbor and very close friend of Philip D. Paull, has transferred to him one share of common stock by Philip D. Paull on October 2, 1941. George H. Miller, who is advised to be a truck driver and an uncle of Harry Hobstetter, an officer and employee of Fidelity and a witness for the debtor, had transferred to him one share of preferred stock by D. A. Burt on October 2, 1941. Gordon E. Hobstetter, a cousin of the said Harry Hobstetter, had [fol. 341] transferred to him one share of preferred stock by D. A. Burt on October 2, 1941. W. L. Burt is the son of D. A. Burt, and had transferred to him ten shares of preferred stock by D. A. Burt on October 2, 1941. James S. Paull is the father of Philip D. Paull and brother-in-law of John Marshall, Sr., and uncle of John Marshall, Jr., his sister having married John Marshall, Sr., and the said James S. Paull is the son of Joseph F. Paull, founder of Fidelity. Philip D. Paull is the son of James S. Paull and nephew of John Marshall, Sr., and cousin of John Marshall, Jr. A. C. Hazlett is the son of the former partner of D. A.

Burt in the brokerage business of Hazlett and Burt, and is, or was, an employee of the brokerage firm of Hazlett and Burt, and was for many years past so employed.

8. On pages 14 and 15, the Court omitted to state that there was a strenuous objection to the stockholders' meeting of October 3, 1941, on the ground that the board of directors had abolished both the common and preferred classes of stock of Fidelity and had substituted therefor a new class of stock for which the old classes of stock could be exchanged, and that no shares of stock present at the meeting of October 3rd were of this new and only class of existing stock, but that all shares of stock there present were only the old shares of stock which had been abolished.

9. In view of the above, the Court's conclusion of law, on page 22 of the opinion, " \* \* \* but I may properly say in passing that the October 3rd meetings were in all respects legal," should be changed to read, "The October 3rd meetings were in all respects illegal and were void and of no effect."

10. On page 15, the Court, in speaking of the authority to employ Allen G. Messick and James R. Fleming to assist the trustee in certain matters, stated that such authority later had been revoked, and it is suggested that the dates of such revocations should be inserted. The Court further stated, " \* \* \* Messick and Fleming were never actually employed by the trustee," and it is submitted that the Court should set forth the facts as shown by the record, wherein Messick and Fleming held themselves out as employed by the trustee to the officials of the State of Wisconsin and to the various officials of the states in which Fidelity did business, who met in Chicago, Illinois, at which meeting Mr. Fleming was present, and should further set forth the evidence [fol. 342] concerning Mr. Fleming and Mr. Messick as shown by the record and as stated by Mr. Fleming and Mr. T. C. Townsend in their remarks to the Court.

11. On page 21, the Court, in its conclusions of law, states: "It is an elementary principle of law that one who resigns an office may recall or revoke his resignation at any time before it is accepted." It is submitted that this might be true of one who had occupied the office of a director, but as to one who never occupied the office of director, and Wheeler



Bachman was such a person with regard to Fidelity, until he had accepted the office of director he had no office to resign from, and that his refusal, in writing to qualify as a director did not need action by the board of directors, but became effective when received by the company, and that he could not therefore occupy the office of director without being reelected.

12. On page 22, the Court states: "It follows that the filing of the petition for corporate reorganization, though originally not properly authorized, was afterwards duly ratified," and it is submitted that the conclusion of law by the Court, in view of all of the above, should be, "was afterwards never duly ratified", and therefore the judgment should be amended to the effect that the petition was never properly authorized, and therefore the Court has no jurisdiction.

13. In view of the Court's conclusions of law on the question of whether reorganization can be effected, beginning on page 27 and continuing through page 30, it is submitted that the Court, on the basis of its own findings as therein set forth, should hold, "It is unreasonable to expect that a plan of reorganization can be effected other than a plan for a slow, beneficial and orderly liquidation, and it is unreasonable to expect that there can be any successful rehabilitation of the debtor as a going or continuing corporation."

14. It is submitted that the Court should find that the extravagant sales and promotion expenditures, and expenditures for lavish offices, etc., should from the evidence be held to have been shown to be necessary in order that Fidelity could make the sales which it did make, and in order to employ the salesmen that it did employ.

15. On page 31, the Court states that in its opinion it is absurd to say that a court having jurisdiction only within [fols. 343-346] the State of West Virginia could properly deal with assets located in twenty-nine different states, yet it is submitted that the Court has not taken into account the fact that the United States District Court for the Southern District of West Virginia has no jurisdiction of the persons who possess and control the assets located in the twenty-nine different states otherwise than as they come or be found within the territorial limits of that United States Court.

16. On page 30, the Court finds as a matter of law that the debtor's assets would be peculiarly benefitted in a slow and orderly liquidation, and that the dumping of twenty million dollars worth of securities of the kind held by the debtor upon the market would result in substantial losses, and it is submitted that there is no evidence to sustain that finding. On the contrary, there is evidence to show that every large insurance company in America had millions of dollars in cash in its treasury and was looking for the opportunity to buy good securities of the kind held by the debtor, and it is common knowledge that many times twenty million dollars worth of securities were sold by the British Government in the United States of America on "over the counter" deals, after the market had closed, without substantial losses, and it is submitted that the opinion be corrected in this regard.

It is therefore respectfully moved that the findings of the Court and the judgment be accordingly amended as hereinabove set out.

Respectfully submitted, (S.) Clarence W. Meadows, by J. C. Palmer III. Clarence W. Meadows, Attorney General of West Virginia, Attorney for Edgar B. Sims, Auditor, etc., of the State of West Virginia. (S.) Koontz & Koontz, by J. Campbell Palmer III. Koontz & Koontz, Attorneys for West Virginia State Court Receivers.

[fol. 347] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO AMEND FINDINGS, ETC.—  
February 25, 1942

This cause came on February 11, 1942, to be heard on the motion of the West Virginia State Court Receivers that a certain letter, dated September 19, 1941, addressed by the Honorable Julian F. Bouchelle, Judge of the Circuit Court of Kanawha County, West Virginia, to the Honorable Ben Moore, Judge of the United States District Court for the Southern District of West Virginia, and the reply of the said Honorable Ben Moore thereto, be made a part of the record in this cause, to which motion the Debtor, by counsel, objected on the ground that the motion was too late, the case

having been heretofore submitted and decided by the Court, and the Securities & Exchange Commission, by counsel, objected, unless the Order show the purposes for which the letters are received, on the ground that they are hearsay evidence of the truth of what the letters contain; and it being represented to the Court by movants that the Honorable Julian F. Bouchelle has no objection to the said letters being incorporated in the record in this cause, and after argument of counsel and full consideration thereof, the Court is of opinion to file said letters among the papers in this cause, only for the limited purpose of showing that said letters were exchanged, unless the Honorable Julian F. Bouchelle [fol. 348] is presented for cross-examination; and the movants having thereupon requested the said Julian F. Bouchelle to present himself for cross-examination, and reported to the Court that the said Honorable Julian F. Bouchelle did not wish to testify in this cause, it is,

Ordered, that the said letters may be filed among the papers of this cause, but only for the limited purpose of showing that such a letter was written to the said Honorable Ben Moore and that he replied thereto, and not as proof of the matters stated in said letters.

And thereupon this cause came on to be heard on the motion of the West Virginia State Court Receivers and the other parties hereto who have filed herein a notice of appeal to the Circuit Court of Appeals that a day be fixed for filing and docketing the record on appeal, and after argument of counsel and full consideration thereof, it is,

Ordered, that the record on appeal shall be filed with the Circuit Court of Appeals on March 12, 1942, except that the original exhibits introduced at the hearings held herein shall be filed with the Circuit Court of Appeals on April 10, 1942; and it is further,

Ordered, that any of the parties hereto may, prior to April 10, 1942, use the said exhibits for a reasonable time in working on the matters connected with said appeal, on giving a proper receipt therefor to the Clerk of this Court. [fol. 349] And thereupon this cause came on to be heard on the motion of the West Virginia State Court Receivers and the other parties hereto who have filed herein a notice of appeal to the Circuit Court of Appeals that the original exhibits introduced in evidence at the hearings held herein be sent to the Circuit Court of Appeals in lieu of copies

thereof, and after argument of counsel and full consideration thereof, it is,

Ordered, that said motion be and the same is hereby sustained, and that the said original exhibits introduced in evidence at the hearings held herein be sent to the Circuit Court of Appeals in lieu of copies thereof; and it is further,

Ordered, that the Clerk of this Court do personally deliver the said original papers and exhibits to the Clerk of the Circuit Court of Appeals at Richmond, Virginia, or do send them to the said Clerk of the Circuit Court of Appeals by a competent messenger selected by the Clerk of this Court; and it is further,

Ordered, that the said original papers and exhibits be returned to the Clerk of this Court when the Circuit Court of Appeals shall have finished with them, and that the Clerk of this Court be and he is hereby authorized to take such steps as he may deem proper for their safe return to his office.

And thereupon this cause came on to be heard upon the motion of the Debtor that the West Virginia State Court Receivers and the other parties to this cause who have filed notice of appeal to the Circuit Court of Appeals be required to notify the Debtor and other appellees as to what part of the record they propose to print as an appendix to their briefs, respectively, not later than March 22, 1942, and after argument of counsel thereon and full consideration thereof, there being no objection thereto, it is;

[fol. 350] Ordered, that the said motion be sustained, and that the appellants notify the appellees what part of the record each of said appellants proposes to print as an appendix or supplement to the brief of each said appellant, not later than March 22, 1942.

And thereupon the West Virginia State Court Receivers tendered to the Court and asked leave to file their motion, in writing, that the Court hold a hearing and enter an order adjudicating the Debtor a bankrupt, or dismiss this proceeding; that the Court fix a time, not later than March 13, 1942, within which the Trustee shall comply with Section 167 (1) of the Bankruptcy Act, particularly with



respect to the continuance of the operation of the Debtor's business; that the Trustee file immediately the report prescribed by Section 167 (5) of the Bankruptcy Act; that the Court fix a time, not later than March 13, 1942, within which the Trustee shall file the report required by Section 169 of the Bankruptcy Act; that the Court fix the division of creditors and stockholders into classes in pursuance of Section 197 of the Bankruptcy Act; that a hearing be held to determine similarly the value of the securities held by secured creditors, and to classify as unsecured the amount of their said claims in excess thereof; and that the time for filing claims under Section 196 of the Bankruptcy Act be not fixed until the classification of creditors is determined, and the said motion was Ordered filed. Thereupon this cause came on to be heard on the said motion of the West Virginia State Court Receivers, and after argument of counsel and full consideration thereof, it is,

Ordered, that the said motions be overruled; and it is further,

[fol. 351] Ordered, that said motions of the West Virginia State Court Receivers be dismissed as improvidently filed.

And thereupon this cause came on again to be heard on the motion of L. H. Brooks, Trustee, Frederic Leake, and A. L. Goldberg, Jr., Trustee, that Central Trust Company, Trustee, forthwith make and file a report, as provided for in Section 167 of the Bankruptcy Act, as to the desirability of the formulation of a plan of liquidation in accordance with their suggestions, and after argument of counsel and full consideration thereof, it is,

Ordered, that said motion be and the same is hereby overruled.

And thereupon this cause came on again to be heard on the motion of L. H. Brooks, Trustee, Frederic Leake, and A. L. Goldberg, Jr., Trustee, that Central Trust Company, Trustee, forthwith make and file a report in accordance with Section 167 of the Bankruptcy Act as to the desirability of the continuance of the Debtor's business, and after argument of counsel and full consideration thereof, it is,

Ordered, that said motion be and the same is hereby overruled.

And it appearing to the Court that Central Trust Company, Trustee, has assembled additional information relating to the matters mentioned in Section 167 of the Bankruptcy Act, it is,

Ordered, that Central Trust Company, Trustee, prepare and file within sixty days from this date a further report thereon.

[fol. 352] And thereupon this cause came on again to be heard on the motion of L. H. Brooks, Trustee, Frederic Leake, and A. L. Goldberg, Jr., Trustee, that the Court enter an Order fixing, in accordance with Section 197 of the Bankruptcy Act, the division of creditors into classes according to the nature of their respective claims, and set an early date for a hearing for such purpose, and that the Court fix a time within which Central Trust Company, Trustee, shall prepare and file a plan or a report of its reasons why a plan cannot be effected, and also a subsequent time for a hearing on such plan or report in accordance with Section 169 of the Bankruptcy Act, and that the Court advance the time of such hearings in accordance with Section 171 of the Bankruptcy Act, and after argument of counsel and full consideration thereof, it is,

Ordered, that said motion be and the same is hereby overruled.

And thereupon this cause came on again to be heard on the motion of L. H. Brooks, Trustee, Frederic Leake, and A. L. Goldberg, Jr., Trustee, that the Court enter an Order restraining the Trustee from sending out any notices to policy holders to file claims in this proceeding until there has been a division of creditors into classes and an Order of the Court fixing a time for filing of claims, and that no Order be made with regard to the filing of claims of creditors until a hearing has been held on certain motions theretofore filed, and after argument of counsel and full consideration thereof, it is,

Ordered, that said motion be and the same is hereby overruled.

[fols. 353-396] And thereupon this cause came on again to be heard on the motion of Edgar B. Sims, Auditor etc., and of the West Virginia State Court Receivers, that the findings made by the Court in its written opinion filed herein

be amended in certain particulars, and that the judgment of the Court be amended accordingly, and after argument of counsel and full consideration thereof, it is,

Ordered, that said motion be and the same is hereby overruled, except that any typographical errors shall be corrected, and that the correction requested in section one of said motion will be made.

And thereupon the Debtor, by counsel, moved that all the statements of facts contained in the said motion of Edgar B. Sims, Auditor etc., and of the West Virginia State Court Receivers, which are not based on testimony introduced at the hearings held herein before the case was submitted, be expunged from the record in this proceeding, and after argument of counsel and full consideration thereof, it is,

Ordered, that said motion be and the same is hereby sustained, and the said statements of facts are hereby expunged from the record in this proceeding.

And thereupon Edgar B. Sims, Auditor etc., and the West Virginia State Court Receivers, by counsel, moved that the hearings in this cause be re-opened for the introduction of additional testimony, and after argument of counsel and full consideration thereof, it is,

Ordered, that the said motion be and the same is hereby overruled.

Enter: Ben Moore, United States District Judge.

February 25, 1942.

(S.) O. K. for Appellants by J. C. Palmer III.

. . . . .

[fol. 397] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

No. 4923

EDGAR B. SIMS, Auditor of the State of West Virginia, and  
Ex-Officio Insurance Commissioner of the State of West  
Virginia; Ross B. Thomas and H. Isaiah Smith, West  
Virginia State Court Receivers; Banking Commission  
of Wisconsin; Chas. R. Fischer, Commissioner of In-  
surance and Permanent Receiver for Debtor Corporation  
in and for the State of Iowa; John B. Gontrum, Insur-  
ance Commissioner of the State of Maryland; Dewey  
S. Godfrey, Missouri State Court Receiver; and L. H.  
Brooks, Trustee, Frederic Leake and A. L. Goldberg, Jr.,  
Trustee, Appellants,

versus

FIDELITY ASSURANCE ASSOCIATION, a Corporation, Debtor,  
Appellee

Appeal from the District Court of the United States for  
the Southern District of West Virginia, at Charleston.  
In Bankruptcy

March 12, 1942, the transcript of record is filed and the  
cause docketed.

Same day, joint motion of the parties to advance the  
case for argument is filed in open court before Parker,  
Soper and Dobie, Circuit Judges, and submitted.

ORDER ASSIGNING CASE FOR ARGUMENT, ETC.—Filed and  
Entered March 12, 1942

On Consideration of the Joint Motion of the parties in  
this cause, by their respective counsel, and for good cause  
shown,

It Is Ordered by this Court that the above case be, and  
the same is hereby assigned for argument at the April  
Term of this Court at Richmond, Va., on Monday April  
20, 1942.

It Is Further Ordered that the briefs on behalf of the  
appellants be filed not later than Tuesday March 24, 1942;  
[fol. 398] that the briefs for the Debtor and any briefs  
submitted on behalf of the Securities and Exchange Com-



mission or on behalf of the Trustee be filed not later than Saturday April 11, 1942; and any reply briefs submitted on behalf of any of the appellants be filed not later than Friday April 17, 1942.

March 12, 1942.

John J. Parker, Senior Circuit Judge.

March 14, 1942, the appearance of Guy B. Brown and H. Vernon Eney is entered for the appellant John B. Gontrum, Insurance Commissioner of the State of Maryland.

Same day, the appearance of J. Campbell Palmer, III, is entered for the appellants Edgar B. Sims, Auditor, etc., Ross B. Thomas and H. Isaiah Smith, West Virginia State Court Receivers.

March 16, 1942, the appearance of John V. Ray is entered for the appellee, and the appearance of T. C. Townsend and Hillis Townsend is entered for the appellee (Trustee).

Same day, the appearance of Rudolph K. Schurr is entered for the appellant Dewey S. Godfrey, Missouri State Court Receiver.

Same day, petition of Banking Commission of Wisconsin, Charles R. Fischer, Insurance Commissioner of the State of Iowa, Edgar B. Sims, Auditor and Ex-Officio Insurance Commissioner of the State of West Virginia, and Ross B. Thomas and H. Isaiah Smith, West Virginia State Court Receivers, for leave to file joint brief not exceeding 100 pages, etc., is filed.

March 17, 1942, the appearance of Clarence W. Meadows, Attorney General of West Virginia, is entered for the appellant Edgar B. Sims, Auditor, etc.

March 19, 1942, the appearance of Fyke Farmer is entered for the appellants L. H. Brooks, Trustee, Frederic [fol. 399] Leake and A. L. Goldberg, Jr., Trustee.

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#### IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER AS TO LENGTH OF BRIEFS, ETC.—Filed March 20  
1942

Upon the Application of Edgar B. Sims, Auditor, etc.; H. Isaiah Smith and Ross B. Thomas, West Virginia State Court Receivers; Banking Commission of Wisconsin, and

Charles R. Fischer, Commissioner, etc., appellants, by their respective counsel, and for good cause shown,

Leave Is Hereby Granted Edgar B. Simis, Auditor of the State of West Virginia, and Ex-Officio Insurance Commissioner of the State of West Virginia; and Ross B. Thomas and H. Isaiah Smith, West Virginia State Court Receivers, appellants in the above-entitled case, to file a joint brief in their behalf not exceeding 100 printed pages in length; and the Banking Commission of Wisconsin and Charles R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation in and for the State of Iowa, appellants, to file a joint brief in their behalf not exceeding 100 printed pages in length; and

Leave Is Also Granted the appellants to print a joint statement of facts, not to exceed 60 printed pages in length, which shall be printed only in the brief filed on behalf of the joint West Virginia appellants; and shall not be counted within the limited number of pages of the joint brief to be filed on behalf of the West Virginia appellants.

March 19, 1942.

John J. Parker, Senior Circuit Judge.

March 23, 1942, the appearance of Richard H. Lauritzen, Assistant Attorney General, State of Wisconsin, is entered for the Appellants Banking Commission of Wisconsin and Chas. R. Fischer, Commissioner of Insurance, etc. [fol. 400] Same day, the appearance of Carl J. Stephens and Ben C. Buckingham is entered for the appellant Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for the debtor corporation for the State of Iowa.

Same day, brief and appendix on behalf of the appellants Banking Commission of Wisconsin, et al., are filed.

Same day, brief on behalf of the appellant Dewey S. Godfrey, Missouri State Court Receiver, is filed.

March 24, 1942, joint brief and appendix on behalf of the West Virginia appellants are filed.

Same day, brief and appendix on behalf of appellant John B. Gontrum, Insurance Commissioner of the State of Maryland, are filed.

Same day, brief and appendix on behalf of appellants L. H. Brooks, Trustee, et al., are filed.

April 3, 1942, the appearance of James R. Fleming is entered for the appellee.

April 10, 1942, the original exhibits are certified up.

Same day, brief and appendix on behalf of the appellee are filed.

Same day, brief on behalf of Central Trust Company, Trustee, is filed.

April 11, 1942, brief on behalf of Securities and Exchange Commission is filed

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IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING SECURITIES AND EXCHANGE COMMISSION  
LEAVE TO FILE BRIEF EXCEEDING FIFTY PRINTED PAGES—  
Filed April 13, 1942

Upon The Application of counsel for the Securities and Exchange Commission, and for good cause shown,

Leave is hereby granted the Securities and Exchange [fol. 401] Commission to file a brief exceeding 50 printed pages but not in excess of 100 printed pages.

April 10, 1942.

John J. Parker, Senior Circuit Judge.

April 13, 1942, motion of Dorr E. Warner for leave to file brief as *amicus curiae* filed in open Court before Parker, Soper and Dobie, Circuit Judges, and submitted.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING LEAVE TO DORR E. WARNER TO FILE BRIEF  
AS AMICUS CURIAE—Filed and Entered April 13, 1942

Upon The Application of Dorr E. Warner, Esq., Attorney for Contract Holders of the debtor, and for good cause shown,

Leave is hereby granted him to file twenty-five copies of a printed brief as *amicus curiae* in the above entitled case.

April 13, 1942.

John J. Parker, Senior Circuit Judge.

April 13, 1942, brief on behalf of Dorr E. Warner as *amicus curiae* is filed.

April 16, 1942, reply brief on behalf of appellant Banking Commission of Wisconsin is filed.

April 17, 1942, reply brief on behalf of appellant John B. Gontrum, etc., is filed.

Same day, reply brief on behalf of West Virginia appellants is filed.

[fol. 402] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

[Title omitted]

PETITION TO REMAND CASE TO DISTRICT COURT FOR A REHEARING THEREIN ON THE GROUND OF NEWLY DISCOVERED EVIDENCE—Filed April 18, 1942

Comes now Edgar B. Sims, Auditor and ex officio Insurance Commissioner of the State of West Virginia, appellant in the above case, by counsel, and moves this Honorable Court that the case be remanded to the District Court for a rehearing therein on the ground of newly discovered evidence.

[fol. 403] Background of the Newly Discovered Evidence

On page 41 of the brief filed by the Wisconsin and Iowa appellants, there is set forth parts of the minutes of the Board of Directors' meeting of, December 31, 1940, being Exhibit 100, page 156 of the board of Directors' Minutes, wherein it is shown that the company was advised that its amendment to its charter to change its name and to do an insurance business had been granted, and its license as such had been issued.

Thereafter, as shown by the minutes (pp. 156-7), the following took place:

"Authority to Issue Insurance on Income Reserve Contracts, Series B

"Upon motion by Mr. Reed, seconded by Mr. John Marshall, Jr., the following resolution was unanimously passed:

"Whereas, the Fidelity Investment Association has amended its charter and has for its purposes the issuing of insurance upon the lives of persons and the granting and disposing of annuities, and has changed its name to Fidelity Assurance Association, and



"Whereas, it is qualified and admitted to transact such business, now, therefore,

"Be It Resolved, That the Association assume, and it does hereby assume and agree to fulfill and pay all the risks and obligations of the insurance policy and the insurance company mentioned in Section 6 of all Income Reserve Series B Contracts now insured by the Lincoln National Life Insurance Company, and

"Be It Further Resolved, That the rider submitted herewith be sent, in duplicate, to each owner of such Income [fol. 404] Reserve Series B Contracts, and that such rider become and be a part of the Income Reserve Series B Contract to which each such rider shall apply, and that an accompanying explanatory letter be sent by the company to each contract owner with such rider, asking each such contract owner to sign such rider, in duplicate, and attach the original to his contract and return the duplicate to the Association.

#### Approval of Rider and Letter.

"An insurance rider and letter of explanation to be sent all Income Reserve Series B Contract holders with insurance protection were submitted to the Board, and upon motion, duly made and seconded, President Risléy was requested to send out the following rider and letter to such contract holders."

The letter is set forth both at page 156 of the Minutes and at page 41 of the Wisconsin and Iowa brief, and the rider is set out at page 157 of the Minutes, as follows:

"December 31, 1940.

"Dear Contract-owner:

"It is with pleasure and confidence that we direct your attention to the change in our name and the widening of the scope of our business to that of issuing insurance on the lives of persons. In the future, the company will be known as Fidelity Assurance Association and will offer a complete line of life insurance policies of all types and classes, including life annuities.

"These changes enable us, as a qualified legal reserve life insurance company, to assume the risks and obligations provided in Section 6 of your contract. As you know, this Section makes available to you insurance covering all

[fol. 405] monthly payments not yet made in event of your death. Such insurance protection has, in the past, been procured from a legal reserve life insurance company, but was subject to cancellation, upon due notice, at any time. With the making of your regular monthly payments and the Association assuming the insurance, this condition has been eliminated.

"By resolution of the Board of Directors and by the rider enclosed in duplicate, the Association assumes and itself agrees to fulfill and pay the risk and obligations of the insurance policy and of the insurance company mentioned in Section 6 of your contract. The original of the rider is to be signed and attached to your Income Reserve Contract, Series B and the other (the blue one) signed and returned to the Association in the enclosed envelope."

#### **"Fidelity Assurance Association**

**"Assumption of risk and rider attached to and a part of Income Reserve Contract Series "B" Number**

"The Association, having so amended its charter as to authorize it to issue insurance upon the lives of persons and every insurance appertaining thereto and to grant and dispose of annuities, and to change its name to Fidelity Assurance Association, in consideration of the monthly payments, provided for in the above numbered contract hereby assumes and does itself hereby agree to fulfill and pay all the risks and obligations of the insurance policy and the insurance company mentioned in Section 6 of said contract.

"It is hereby agreed between the Association and the contract holder that this insurance agreement shall become and be a part of said contract and the original shall be attached thereto.

[fol. 406] "Executed in duplicate at Wheeling, West Virginia this 31st day of December, 1940.

**"Fidelity Assurance Association, (s.) F. s. Risley,  
President.**

**— — —, Contract Owner."**

All of the above was in evidence during the hearing of the case, together with the statements of many officers of the Debtor to the effect that no insurance contracts were ever entered into, or insurance been engaged in, after January 1, 1941.

### The Newly Discovered Evidence

Within the last ten days counsel has been advised that on December 31, 1940, not only was the letter of explanation sent out to each Series B Contract holder, together with the two enclosed riders, but that thereafter, during the year 1941, *approximately one-half of all Series B Contract holders with insurance executed one of the riders and returned it to the company*, where they are now and have been on file. Counsel are further advised by the Banking Commission of Wisconsin that they have in their possession many contracts on which the other duplicate rider has been physically attached to the Fidelity contract.

### Effect of the Newly Discovered Evidence

The District Court's opinion on the question of insurance was made without knowledge of this evidence, and was based to a large extent upon the fact that after January 1, 1941, Fidelity never engaged in any insurance business. Counsel for the Debtor in the reply brief persistently asserts that Debtor never did any insurance business after January 1, 1941.

[fol. 407] Counsel contends that the mailing of these letters to the contract holders, after the passage of the resolutions of the Board of Directors, and acceptance by the contract holders by signing the rider and returning it to the company, and physically attaching the duplicate to their contracts, constituted a binding contract of insurance between the Debtor and those executing contract holders. It is further contended that Fidelity therefore engaged in the insurance business in 1941, by agreeing to insure the B Contract holders itself, which as between it and the contract holders was a valid and binding contract, since at that time its amended charter was in effect, its name had been legally changed, and it had a license to do an insurance business. (See Exhibit 24, R. 497, 500.)

As the question of whether Fidelity was an insurance company at the time the Debtor's petition was filed is one of the main jurisdictional questions to be decided by this Court, it is respectfully submitted that this evidence is and should be considered.

### Question of Due Diligence

The attorney for the Debtor and attorneys for the Trustee were immediately advised thereof, in order to ascertain the correctness of the facts, who, after investigation, confirmed their correctness. As well those attorneys advised that the Banking Commission of Wisconsin had had correspondence with the Debtor concerning this letter and these riders, which was found to be correct upon investigation; that the State of Virginia had insisted that the Debtor was doing business in the State of Virginia without authority so to do, by virtue of said letter and riders; that a conference was held with Fidelity officials concerning same, which upon investigation, was found to be correct.

[fol. 408] It was further found, upon investigation, that the officers of Fidelity contended to both Wisconsin and Virginia that these acts were not acts of doing an insurance business, as is shown by copies of letters attached hereto, and is undoubtedly the reason that those officers testified in these proceedings that no insurance business had ever been done.

Counsel is advised that Mr. H. Isaiah Smith, the principal officer of the Trustee in charge of Fidelity's work, as late as February 11, 1942, advised Mr. Rickard H. Lauritzen, Assistant Attorney General of Wisconsin, upon being specifically questioned concerning the resolutions of December 31, 1940, and the letter and riders, that to the best of his knowledge and remembrance nothing was done concerning said resolutions and letters, and did not disclose, if he then knew it, that the riders had been executed and returned to Fidelity.

The Auditor of the State of West Virginia, whose affidavit is attached hereto, and Mr. Harlan Justice, his deputy, both were ignorant of the fact that any replies had been received to said letter and riders, although they were advised prior to trial that the letters had been sent out, but upon being informed by Debtor's officers that no acts of insurance were engaged in by the Debtor between January 1st and June 6th, 1941, they made no further investigation of the matter.

Counsel is further advised by counsel for the Trustee and the Trustee's employees that there was no change in the relationship at any time between Fidelity and Lincoln



Life Insurance Company, and that while Fidelity continued to receive the premiums for the B Series Contracts, which included the premiums for insurance, it transmitted the insurance premiums to Lincoln Life Insurance Company, and that it did not on its books ever set up any life insurance company accounts, nor make any arrangements [fol. 409] or provisions for carrying into effect its contract and agreement to insure the B Contract Series, other than as is hereinafter set out.

However, the record in this proceeding shows that in Exhibit 100, pages 157-8 of the Minutes of the Board of Directors' Meetings, the Debtor was authorized to offer to all present contract holders a new *policy* in exchange for their present contract, and a committee was selected to work out the policy; a committee was selected to work on re-insuring policies with a legal reserve life insurance company, and the Board of Directors passed a resolution to re-insure all risks on individuals for amounts over \$2500.00 with a legal reserve life insurance company; a resolution was passed for the purpose of meeting requirements of various insurance departments, to have the fiscal year of the Debtor run the same as the calendar year, instead of ending October 31st.

These are all of the facts pertinent to and surrounding the newly discovered evidence, and it is respectfully moved that this Court, under the rule of *Isgrid v. U. S.*, 109 F. (2d) 131, consider whether there has been due diligence by the movants, and whether the evidence is of such pertinency as to cause this Court to consider remanding the case to the lower Court.

Respectfully submitted.

Clarence W. Meadows, Attorney General of West Virginia,  
Ira J. Partlow, Assistant Attorney General of West Virginia,  
Attorneys for Edgar B. Sims, Auditor, etc., of the State of West Virginia.

[fol. 410]

January 15, 1941.

Honorable George A. Bowles, Commissioner of Insurance,  
Richmond, Virginia.

DEAR SIR:

Acknowledgment is made of your wire of January 13 in reference to the assumption by Fidelity Assurance As-

sociation of insurance risks provided in Section 6 of our Income Reserve Series "B" Contracts.

The letter to which you refer in your telegram was mailed from Wheeling, West Virginia to all contract-owners on December 31, 1940 for the purpose of extending to them the privilege of transferring the insurance or self-completion risk, as provided in Section 6 of the contract, to the Fidelity Assurance Association. Such assumption of this risk by Fidelity was dependent upon the decision of the individual contractowners who had the right to either approve or reject such proposal.

The letter was in no way considered by this Association as a means of soliciting insurance, but was a statement in reference to the insurance as provided in Section 6 of the contract. In view of the fact that there was no solicitation, it is not believed that the letter was in violation of any law or statute of any State.

As explained by telephone, this Association is not soliciting insurance either by mail or personal solicitation and will not until licenses have been granted to the company and its agents.

We trust that this letter satisfactorily explains the situation.

Very truly yours,

F. J. McNulty, Vice President and Secretary.

FJMcN/CMH

[fol. 411] Commonwealth of Virginia, State Corporation  
Commission, Bureau of Insurance

Geo. A. Bowles, Commissioner of Insurance

Richmond

Seal. C. B. Coulbourn, Actuary; T. T. Moore, Chief Examiner; Geo. A. Peery, Statistician; James M. Hayes, Jr., Director of Fire Marshals; Zellé G. Knight, License Clerk; Courteney W. Harris, Fire Rate Clerk.

January 23, 1941.

Fidelity Assurance Association, Wheeling, West Virginia.  
Attention: Mr. F. J. McNulty.

GENTLEMEN:

We have received your letter of January 15th in reply to our wire of January 13th.

We have again reviewed this matter and are still of the opinion that your letter of December 31st, addressed to your various contract holders, was a solicitation of insurance in Virginia. Since your association was not licensed as an insurance company, this would appear to be a clear violation of the law. We understood from previous correspondence and from other information that your association expected to apply for a license as in an insurance company in this State, but we have as yet received no further information.

We shall appreciate it if you will let us know when we may expect to receive your application.

Very truly yours,

(signed) Geo. A. Bowles, per M. Commissioner of Insurance.

TTM:J

March 27, 1941.

[fol. 412] Securities Division, State Corporation Commission, Commonwealth of Virginia, Richmond, Virginia.

GENTLEMEN:

Attention: Mr. Blake T. Newton, Jr., Director.

This will acknowledge receipt of your letter of March 25th. We have not ignored the objections raised by representatives of the Commission at the conference held in Charleston, but it seemed useless to pursue the question further at this time.

After we sent out our original notice to contract holders with respect to insurance, the plan then adopted was, as far as the Association was concerned, modified so that the entire risk is still being carried by The Lincoln National Life Insurance Company. The Association does not as yet have any insurance risks outstanding, not fully covered, and the general fund is not subject to the hazards mentioned in your letter.

The plan which will ultimately be followed has not yet been completed, and the suggestion that we organize a new corporation to write the proposed insurance is among the things under consideration. Changing the business over to writing insurance has involved a multiplicity of details. Officials of the Association, with the help of actuaries and auditors, have been studying the matter and are still working on it. Before any insurance is sold and

as soon as our plan begins to take on a definite shape, we will consult with you.

We hope your Division can stand by for a short time. Please advise.

Very truly yours,  
F. s. Risley, President.

FsR:VLM

[fol. 413]

Copy

Allen G. Pflugradt

January 10, 1941.

Fidelity Assurance Association, Wheeling, West Virginia.

GENTLEMEN :

We have your several communications in connection with your desire to discontinue the sale of your contracts in this state from January 1, 1941, forward.

There are several matters we desire more information on and have, through our Attorney General's office, contacted, your local attorney, Mr. Rieser, who has promised to obtain some additional information for us. We particularly want more light on the solicitation you are engaging in with Wisconsin holders of your contracts to change the insurance protection under Section 6 of your Series B income reserve contracts.

We cannot understand that it is in the best interests of Wisconsin holders to transfer their insurance protection from a company licensed to do business in Wisconsin to a company not licensed to do business in Wisconsin.

Inasmuch as it is your intention not to make any further sales of contracts in Wisconsin, we would appreciate receiving a schedule of all contracts held by Wisconsin holders, the names, addresses, matured value and present cash surrender value of such contracts. We think it would be cheaper for you to prepare this schedule, properly certified, than it would be for us to send an examiner to your office to obtain it.

We expect to have a conference with Mr. Reiser the latter part of next week and by that time we should have



[fol. 414] an answer to this letter, whereupon you will probably hear from us further.

Yours very truly,

Banking Commission of Wisconsin, By ———,  
Chairman.

AGP:JC

Copy

Organized 1911

Fidelity Assurance Association, Wheeling, West Virginia  
Offices in Principal Cities

Received, Jan. 16, 1941. State Banking Dept.

January 15, 1941

Banking Commission of Wisconsin, One West Wilson  
Street, Madison, Wisconsin.

Attention: Hon. Allen G. Pflugradt.

DEAR SIR:

Acknowledgment is made of your letter of January 10 in reference to the assumption by Fidelity Assurance Association of insurance risks provided in Section 6 of our Income Reserve Series "B" Contract.

On December 31, 1940 a letter was mailed from Wheeling, West Virginia to all contractowners for the purpose of extending to them the privilege of transferring the insurance or self-completion risk, as provided in Section 6 of the contract, to the Fidelity Assurance Association. Such assumption of this risk by Fidelity was dependent [fol. 415] upon the decision of the individual contractowners who had the right to either approve or reject such proposal.

The letter was in no way considered by this Association as a means of soliciting insurance, but was a statement in reference to the insurance as provided in Section 6 of the contract. This Association is not soliciting insurance either by mail or personal solicitation and will not until licenses have been granted to the company and its agents.

In reference to your request that we prepare a schedule of all contracts held by Wisconsin residents giving names,

addresses, face amount and cash liability of such contracts, such schedule will be prepared if agreeable to you, as of January 31, 1941. We are suggesting January 31 rather than December 31, 1940 since the compilation of the information at December 31 would involve the reconstruction of our current records and would involve individual handling and sorting of thousands of accounts. All possible haste will be used and we sincerely trust that the date as suggested by us will be entirely agreeable to the Commission.

We hope that this letter will satisfactorily serve your purpose.

Very truly yours,

F. J. McNulty (s), F. J. McNulty, Vice President and Secretary.

FJMcN/CMH

[fol. 416] Affidavit of Edgar B. Sims in Support of Motion to Remand Case on the Ground of Newly Discovered Evidence

Edgar B. Sims states that he is the regularly selected and duly qualified Auditor of the State of West Virginia and ex officio Insurance Commissioner; that he is familiar, as such officer, with the affairs of Fidelity Assurance Association; that on December 31, 1940, he issued a life insurance license to said company for the purpose of enabling them to receive payments on their outstanding contracts; but told the company officials not to sell any insurance; that he so testified in the proceedings (R. 500); that there was an understanding, or gentleman's agreement that the company would abide by these instructions, until he gave further permission to them; that until the proceedings were instituted in the Circuit Court of Kanawha County, West Virginia, he had understood that that agreement had been complied with. Thereafter, he was informed of certain resolutions passed by the Board of Directors of Fidelity on December 31, 1940, but was assured that no act of insurance had been performed thereunder; and he was not advised and remained ignorant of the fact that contract holders executed riders, which had been sent to them, and returned them to the company, until he was advised thereof by his counsel within the last several days; that he attended most of the hearings had before the United States District Court,

in Charleston, West Virginia, and heard various officers of the Debtor testify that the company had engaged in no insurance business under the license issued by him; that for that reason, and for the reason that the minutes of December 31, 1940, were introduced in evidence, he made no further investigation concerning the matter; that he relied upon the statements made by the Debtor's officers and felt no occasion to make further investigation, and nothing was [fol. 417] called to his attention, as he now remembers it, whereby he should have known of the receipt by the Debtor of the executed riders; and he says that according to his best belief and recollection he did not know of said receipt by the Debtor of said riders, nor did his counsel know thereof, until they were so advised by the attorneys representing the Wisconsin and Iowa appellants; that the facts set forth in the "Motion to Remand" are correct according to his best belief and knowledge.

Edgar B. Sims, Affiant.

STATE OF WEST VIRGINIA,  
County of Kanawha, To-wit:

Before the undersigned Notary Public, this day came Edgar B. Sims, who, being first duly sworn, says that the facts and allegations set forth hereinabove are true, according to the best of his belief and recollection, except in so far as they are therein stated to be upon information, and that so far as they are therein stated to be upon information, he believes them to be true.

Taken, subscribed and sworn to before me this 15th day of April, 1942.

My notarial commission expires on the 3rd day of November, 1947.

Harry C. Deisher, Notary Public, Kanawha County,  
West Virginia. (Seal.)

[fol. 418] IN UNITED STATES CIRCUIT COURT OF APPEALS  
NOTICE OF MOTION TO REMAND, ETC.—Filed April 18, 1942

Honorable John V. Ray, Attorney at Law, Charleston,  
West Virginia.

Messrs. Townsend and Townsend, Attorneys at Law,  
Kanawha Valley Building, Charleston, West Virginia.

Honorable Justin N. Reinhardt, Attorney, Securities Exchange Commission, 18th and Locust Streets, Philadelphia, Pennsylvania.

**GENTLEMEN:**

Please take notice that on the 20 day of April, 1942, before the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, at 10:00 A. M., of that day, or as soon thereafter as it might be heard, Edgar B. Sims, Auditor and Ex Officio Insurance Commissioner of the State of West Virginia, by the undersigned, will move said Court that the case of Edgar B. Sims, et al. v. Fidelity Assurance Association, Number 4923, be remanded to the District Court for further proceedings therein, on the ground of newly discovered evidence. A copy of said motion and the affidavit of said Auditor is herewith inclosed.

Clarence W. Meadows, Attorney General of the State of West Virginia.

Charleston, West Virginia, April 15, 1942.

April 18, 1942, reply brief on behalf of L. H. Brooks, Trustee, et al., appellants, is filed.

April 20, 1942, appearance of Dorr E. Warner is entered on behalf of Contract Holders Victor Salkeld, et al.

[fol. 419] Same day, the appearance of Justin N. Reinhardt and Homer Kripke is entered for the Securities and Exchange Commission.

**IN UNITED STATES CIRCUIT COURT OF APPEALS**

**MOTION OF WEST VIRGINIA APPELLANTS TO STRIKE BRIEF OF CENTRAL TRUST COMPANY, TRUSTEE—Filed April 20, 1942**

The West Virginia appellants challenge the right of the Trustee and its attorneys to appear on behalf of the Debtor, and their right to sustain Debtor's petition, and the jurisdiction of the District Court, and move to strike their brief from these proceedings. *Loomis v. Gila County*, 103 F. (2d) 312 (certiorari denied, 307 U. S. 643, 83 Law. Ed. 1524) (1939).

Clarence W. Meadows, Attorney General of West Virginia; Ira J. Partlow, Assistant Attorney General; J. Campbell Palmer, III, Of Koontz & Koontz, Counsel for West Virginia, Appellants.



## IN UNITED STATES CIRCUIT COURT OF APPEALS

AFFIDAVIT IN OPPOSITION TO MOTION TO REMAND CASE—Filed  
April 20, 1942

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STATE OF WEST VIRGINIA,  
County of Ohio, ss:

Before the undersigned authority, a Notary Public in and for the County and State aforesaid, this day personally appeared F. J. McNulty, who being by me first duly sworn deposes and says as follows:

That in the early part of 1941 he was Vice-President and Secretary of Fidelity Assurance Association, of Wheeling, West Virginia; that as a part of the preparations which Fidelity Assurance Association made for the purpose of engaging in the insurance business it mailed to certain of its contract holders, on December 31, 1940, a letter relating to [fol. 420] the insurance provided for in Section 6 of certain of its contracts; that the said letter and the so-called "rider" which accompanied it were not intended as a solicitation of insurance by Fidelity Assurance Association, because it was not on that date authorized to engage in the insurance business; that Fidelity Assurance Association was never authorized to engage in the insurance business by the officials of the State of West Virginia in charge of the administration of the statutes of West Virginia relating to insurance, and Fidelity Assurance Association never at any time assumed the risk referred to in said letter and said rider; that after the said letter of December 31, 1940 was mailed, Fidelity Assurance Association received inquiries from the officials of various states, and in reply to said inquiries wrote letters, of which true copies are attached hereto as a part hereof; that the insurance risk provided for in Section 6 of certain contracts issued by Fidelity Assurance Association were never assumed by Fidelity Assurance Association, but were at all times after December 31, 1940 insured by the Lincoln National Life Insurance Company or Columbian National Life Insurance Company, as the same had been insured prior to December 31, 1940; that Fidelity Assurance Association never accepted any

money as a premium on any insurance risk; that Fidelity Assurance Association never at any time insured any risk, and never at any time issued any insurance policy; that no changes were made on the books and records of Fidelity Assurance Association of the character which would have been necessary had it engaged in the insurance business, that the books of Fidelity Assurance Association show that it has never received any premium income, has never set up any reserves, nor provided for the surplus as required to engage in the insurance business in West Virginia.

[fol. 421] Affiant further says that the Lincoln National Life Insurance Company issued to every holder of a contract issued by Fidelity Assurance Association, for which insurance was provided in Section 6 thereof, a policy or certificate; that one of said policies or certificates is attached hereto as a part hereof; that said certificate issued to said contract holders was not cancelled after December 31, 1940 by the Lincoln National Life Insurance Company, nor by Fidelity Assurance Association, and continued to remain in full force and effect as long as the contract holder made the payments provided for in his contract; that a report of the total amount of insurance in effect was submitted monthly to the Lincoln National Life Insurance Company accompanied by a list of terminations and restorations and said monthly list was submitted after December 31, 1940 as theretofore, and included in said report was the total amount of insurance on persons entitled to insurance under the provisions of Section 6 of the contracts issued by Fidelity Assurance Association; that the names of said contract holders who signed the riders sent out with the aforesaid letter of December 31, 1940 were continued on said monthly report and lists after December 31, 1940, and premiums for the insurance on their respective contracts have at all times been paid to Lincoln National Life Insurance Company.

And affiant further says that the records and accounts of Fidelity Assurance Association show that Fidelity Assurance Association did not pay to the State of West Virginia, or any official thereof, any fee for license to do business as an insurance company for the year beginning April 1, 1941; that application for license and check for \$20.00 in payment of fee for the year beginning April 1, 1941 were filed with the Auditor of the State of West Virginia; but

such application was returned by the Auditor and said [fol. 422] check was not cashed and was returned by the Auditor and said license for the year beginning April 1, 1941 was not issued.

And further this affiant saith not.

F. J. McNulty.

Taken, sworn to and subscribed before me this the 18th day of April, 1942. Walter J. Gribben, Notary Public in and for Ohio County, West Virginia. My commission expires December 9, 1949. (Seal of Notary.)

January 25, 1941.

Honorable George A. Bowles, Commissioner of Insurance,  
State Corporation Commission, Richmond, Virginia.

DEAR MR. BOWLES:

We acknowledge receipt of your letter of January 23 regarding the matter of a letter mailed from Wheeling, West Virginia on December 31 to our contractholders. We again assure you that this letter was not considered as solicitation for insurance and the Association did not have the slightest intent nor did it believe such a letter would be in violation of any law.

It is our intention to file application as an insurance company in the State of Virginia at the earliest date possible and we are progressing as fast as possible in the preparation of the financial statement as of December 31, 1940.

We regret very much that we are unable to furnish you at this time with a definite date as to when our application will be filed and we will write you in the near future as to [fol. 423] the approximate date when determined.

Very truly yours, F. J. McNulty, Vice President and Secretary.

FJMcN/CMH.

Copy

Thos. W. Ozlin, Chairman  
Wm. Meade Fletcher, H. Lester Kóoker

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION  
RICHMOND

March 31, 1941.

Honorable F. S. Risley, President, Fidelity Assurance Association, Wheeling, West Virginia.

DEAR MR. RISLEY:

This will acknowledge the receipt of your letter, dated March 27, 1941, which is in reply to my letter of the 25th instant.

The statements made by you therein are quite gratifying. However, it is with extreme regret that we observe that no definite plan has yet been formulatd.

I note that you state that the Association does not yet have any insurance risks outstanding *not fully covered*. I do not fully comprehend what is meant by this statement. Please advise me as to the significance thereof at your earliest convenience.

In view of the indefinite character of the statements made in your letter, I do not feel that we can properly drop the matter of an additional bond or deposit, but this matter will be reviewed in the light of certain statements made by you, and any recommendation made will be dictated by that which our examination reveals.

[fol. 424] With kindest personal regards, I am

Very truly yours, Securities Division, (S.) Blake T.  
Newton, Jr., Director.

btn:rwn.



Copy

April 7, 1941.

Hon. Blake T. Newton, Jr., Director, Commonwealth of Virginia, State Corporation Commission, Richmond, Virginia.

DEAR MR. NEWTON:

Your letter of March 31 followed me around the country and caught up with me just as I was leaving for Wheeling on Saturday.

I am indeed sorry that my letter was not clear regarding the insurance risks outstanding. The Association has not solicited, nor has it issued any insurance policies since receiving its license on December 31, 1940.

As you know, the Association sent all income reserve series "B" holders, whose contracts were insurance protected, a request for permission to amend their contracts so that the Association could carry the risk. The entire amount of the required insurance is still carried by The Lincoln National Life Insurance Company or The Columbian National Life Insurance Company and that is what I meant by the statement that we did not have any insurance risks outstanding that were not fully covered.

Please remember me kindly to Mr. Chichester and Mr. Moore and with kindest personal regards to you, I am  
Very truly yours, — — —, President.

FsR:VLM.

[fol. 425]

Copy

Thos. W. Ozlin, Chairman  
W. Meade Fletcher, H. Lester Hooker  
N. W. Atkinson, Clerk of the Commission

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION  
RICHMOND

April 10, 1941.

Mr. F. s. Risley, President, Fidelity Assurance Association,  
Wheeling, W. Va.

DEAR MR. RISLEY:

This will acknowledge receipt of your letter dated April 7, 1941.

The statements made by you with reference to the insurance risks outstanding clear up the questions that were raised relative to such risks in my letter of recent date.

I hope that at this time you are in a position to advise Mr. Bristow that a definite plan has been adopted for future operations, for we are extremely anxious, and I know you are, to see a resumption of activities with a minimum of delay.

With kindest regards, I am

Sincerely, Securities Division (S.) Blake T. Newton,  
Jr., Director.

BTNr\*vdc.

(Here follow 4 photolithographs, side folios 426-429.)



# THE LINCOLN NATIONAL LIFE INSURANCE COMPANY

FORT WAYNE, INDIANA

Certificate No. E94-G27.140-P

Certifies that it has insured by a Multiple Life Policy or equivalent Individual Policies the lives of certain registered holders of Income Reserve Contracts, Series B, issued by

**Fidelity Investment Association  
WHEELING, WEST VIRGINIA.**

(Herein called the Fidelity)

Subject to the terms and conditions of said Policy, the life of

**George Golder Blake**

(Herein called the Insured)

is insured thereunder against death for a progressively decreasing amount which, with interest compounded semi-annually at the rate of  $4\frac{1}{2}\%$  per annum, is at all times sufficient to enable the Fidelity, to whom said insurance is payable for the account of the Insured and upon receipt of said amount, to waive payment of all monthly payments (less certain deductions) not yet paid but which would otherwise be

payable under the terms and conditions of its Income Reserve Contract, Series B, No. 348-11524 to be issued on or after the effective date of this certificate to the Insured as registered holder thereof.

requiring monthly payments of \$ 15.00 each.

The said Policy provides that the above described insurance shall terminate (a) if premiums are not duly paid thereon, or (b) when all monthly payments required by the Income Reserve Contract shall have been made.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY



Certificate No. B94-C27.140-P

Certifies that it has insured by a Multiple Life Policy or equivalent Individual Policies the lives of certain registered holders of Income Reserve Contracts, Series B, issued by

**Fidelity Investment Association**  
**WHEELING, WEST VIRGINIA.**

(Herein called the Fidelity)

Subject to the terms and conditions of said Policy, the life of

**George Golder Blake**

(Herein called the Insured)

is insured thereunder against death for a progressively decreasing amount which, with interest compounded semi-annually at the rate of  $4\frac{1}{2}\%$  per annum, is at all times sufficient to enable the Fidelity, to whom said insurance is payable for the account of the Insured and upon receipt of said amount, to waive payment of all monthly payments (less certain deductions) not yet paid but which would otherwise be

payable under the terms and conditions of its Income Reserve Contract, Series B, No. 348-11524 to be issued on or after the effective date of this certificate to the Insured as registered holder thereof, requiring monthly payments of \$ 15.00 each.

The said Policy provides that the above described insurance shall terminate (a) if premiums are not duly paid thereon, or (b) when all monthly payments required by the Income Reserve Contract shall have been made.

**THE LINCOLN NATIONAL LIFE INSURANCE COMPANY**

*B. G. Ketchell*

Secretary

Effective Date January 17, 1938

Examined by



THE  
LINCOLN NATIONAL  
LIFE INSURANCE COMPANY

FORT WAYNE, INDIANA

# The Lincoln National Life Insurance Company

FORT WAYNE, INDIANA

HEREBY INSURES the life of the person designated in Schedule A hereof as the Insured, for a period of one month following the date of this Policy, subject to renewal as hereinafter set forth, for an amount to be determined as prescribed, and payable to the Beneficiary designated in said Schedule, subject to the provisions on the second page hereof, which are hereby made a part of this Policy.

This Policy is issued in consideration of the application therefore and of the payment in the manner specified of a premium at the rate shown in Schedule B hereof for the age of the Insured, and based upon the amount of insurance in force on the date when such premium is due.

## SCHEDULE A

### The Insured

Lawrence F. Braun

Amount of insurance \$ 676.00, or any less amount for which this Policy shall have been renewed, payable at the Home Office of the Company immediately upon receipt of due proof of the death of the Insured while this Policy is in force.

Beneficiary: The Fidelity Investment Association for the account of the Insured.

Policy Number	Date of Policy	Age of Issue
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794-06569-P	6/18/35	28
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This Policy may be renewed monthly for one hundred twenty-eight consecutive terms of one month, unless the obligation protected by this Policy is sooner terminated, by the payment at the beginning of each such month of the premium for renewal at the rate shown in Schedule B for the age of the Insured (nearest birthday) at issuance of this Policy and the year of insurance, the amount of each premium to be based upon the amount of insurance to be renewed on the date when such premium is due, which amount shall not exceed the limits shown in Schedule B.

## SCHEDULE B

The amount of insurance hereunder during any policy month shall not exceed the then current limit of insurance per \$676.00 of insurance during the first month, as shown in the following table. For example, if the first month's insurance is \$1,352.00, the limits of insurance will be 200% of the amounts shown in the table: thus in the fourth month, \$1,352.00; in the twentieth month, \$1,292.00; in the forty-eighth month, \$1,012.00.

Month	Limit	Month	Limit	Month	Limit	Month	Limit	Month	Limit	Month	Limit
1-14	\$676	33	\$581	32	\$486	71	\$384	90	\$270	110	\$141
15	671	34	576	33	481	72	378	91	264	111	139
16	666	35	571	34	476	73	372	92	258	112	132
17	661	36	566	35	471	74	366	93	252	113	125
18	656	37	561	36	466	75	360	94	246	114	118
19	651	38	556	37	461	76	354	95	240	115	111
20	646	39	551	38	456	77	348	96	234	116	104
21	641	40	546	39	451	78	342	97	228	117	97
22	636	41	541	40	446	79	336	98	222	118	90
23	631	42	536	41	441	80	330	99	216	119	83
24	626	43	531	42	436	81	324	100	210	120	75
25	621	44	526	43	431	82	318	101	204	121	68
26	616	45	521	44	426	83	312	102	197	122	60
27	611	46	516	45	421	84	306	103	191	123	53
28	606	47	511	46	416	85	300	104	184	124	45
29	601	48	506	47	408	86	294	105	178	125	38
30	596	49	501	48	402	87	288	106	171	126	30
31	591	50	496	49	396	88	282	107	165	127	23
32	586	51	491	50	390	89	276	108	158	128	15
								109	152	129	8

The monthly premium hereunder for any month shall be calculated according to the following premiums per \$1,000.00 of insurance.

Year of Insurance	Age Group at Issue					
	15-33	34-40	41-45	46-50	51-55	56-60
	Mo. Prem.	Mo. Prem.	Mo. Prem.	Mo. Prem.	Mo. Prem.	Mo. Prem.
1	\$0.69	\$0.77	\$0.88	\$1.13	\$1.39	\$2.29
2	.69	.78	.93	1.22	1.71	2.47
3	.70	.79	.97	1.30	1.84	2.67
4	.71	.81	1.05	1.39	1.98	2.88
5	.71	.83	1.09	1.49	2.13	3.11
6	.72	.85	1.15	1.59	2.29	3.36
7	.73	.88	1.22	1.71	2.47	3.64
8	.74	.93	1.30	1.84	2.67	3.93
9	.75	.97	1.39	1.98	2.88	4.25
10	.77	1.05	1.49	2.13	3.11	4.60
11	.78	1.09	1.59	2.29	3.36	4.97



**The Insured**

**Lawrence F. Brahm**

Amount of insurance \$ **576.00**, or any less amount for which this Policy shall have been renewed, payable at the Home Office of the Company immediately upon receipt of due proof of the death of the Insured while this Policy is in force.

Beneficiary: The Fidelity Investment Association for the account of the Insured.

Policy Number	Date of Policy	Age of Issue
---------------	----------------	--------------

<b>94-66569-P</b>	<b>6/18/35</b>	<b>28</b>
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This Policy may be renewed monthly for one hundred twenty-eight consecutive terms of one month, unless the obligation protected by this Policy is sooner terminated, by the payment at the beginning of each such month of the premium for renewal at the rate shown in Schedule B for the age of the Insured (nearest birthday) at issuance of this Policy and the year of insurance, the amount of each premium to be based upon the amount of insurance to be renewed on the date when such premium is due, which amount shall not exceed the limits shown in Schedule B.

19	631	38	556	57	461	76	354	95	340	115	111
20	646	39	551	58	456	77	348	96	334	116	111
21	641	40	546	59	451	78	342	97	328	117	104
22	636	41	541	60	446	79	336	98	322	118	98
23	631	42	536	61	441	80	330	99	316	119	83
24	626	43	531	62	436	81	324	100	310	120	75
25	621	44	526	63	431	82	318	101	304	121	68
26	616	45	521	64	426	83	312	102	297	122	60
27	611	46	516	65	420	84	306	103	291	123	55
28	606	47	511	66	414	85	300	104	284	124	45
29	601	48	506	67	408	86	294	105	278	125	38
30	596	49	501	68	402	87	288	106	271	126	30
31	591	50	496	69	396	88	282	107	265	127	25
32	586	51	491	70	390	89	276	108	258	128	15
								109	252	129	8

The monthly premium hereunder for any month shall be calculated according to the following premiums per \$1,000.00 of insurance.

Year of Insurance	Age Group at Issue					
	15-33	34-40	41-45	46-50	51-55	56-60
	Mo. Prem.	Mo. Prem.	Mo. Prem.	Mo. Prem.	Mo. Prem.	Mo. Prem.
1	\$0.69	\$0.77	\$0.88	\$1.15	\$1.59	\$2.29
2	.69	.78	.93	1.22	1.71	2.47
3	.70	.79	.97	1.30	1.84	2.67
4	.71	.81	1.05	1.39	1.98	2.88
5	.71	.83	1.09	1.49	2.13	3.11
6	.72	.85	1.15	1.59	2.29	3.36
7	.73	.88	1.22	1.71	2.47	3.64
8	.74	.93	1.30	1.84	2.67	3.95
9	.75	.97	1.39	1.98	2.88	4.25
10	.77	1.05	1.49	2.13	3.11	4.60
11	.78	1.09	1.59	2.29	3.36	4.97

IN WITNESS WHEREOF, THE LINCOLN NATIONAL LIFE INSURANCE COMPANY has caused this contract to be signed on the day, month and year stated in Schedule A.

*Arthur F. Hall*  
President

Examined by \_\_\_\_\_

Renewable Monthly Term Policy, 129 Months Unless Obligation Terminates Prior Thereto, Decreasing Limit of Insurance, Non-Convertible, Non-Participating.

FORM 2360-W-3-34-300

## PROVISIONS

**Entire Contract.**—This Policy and the application therefor, a copy of which is endorsed upon or attached to this Policy, constitute the entire contract; and, in the absence of fraud, the statements made in the application shall be deemed representations and not warranties and no such statement shall avoid this Policy unless it be contained in the written application and a copy of such application be attached to or endorsed upon the Policy when issued.

**Modifications, etc.**—No person except the President, a Vice-President, the Secretary or an Assistant Secretary has power to change, modify or waive the provisions of this contract, and then only in writing. The Company shall not be bound by any promise or representation heretofore or hereafter made by or to any agent or person other than as above.

**Payment of Premiums.**—Premiums are due and payable in advance at the Home Office of the Company in the city of Fort Wayne, Indiana, but may be paid to an authorized agent of the Company only in exchange for the Company's receipt therefor signed by the President or the Secretary and countersigned by the agent as evidence of such payment. The payment of any premium shall not continue this Policy in force longer than the time for which the premium payment is made, except as otherwise provided herein.

**Grace Period.**—If any premium is not paid on or before the date it falls due, the policyholder is in default; but a grace of one month (not less than thirty days) without interest charge will be allowed in the payment of every premium after the first, during which time the insurance continues in force.

**Suicide.**—If the Insured shall commit suicide while sane or insane within two years from the date of issue hereof, the liability of the Company under this Policy will be limited to the premiums that have been paid hereon and no more.

**Incontestability.**—This Policy shall be incontestable after two years from date of issue, except for the non-payment of premium, but, if the age of the Insured has been misstated, the amount payable hereunder shall be such as the premiums paid would have purchased at the correct age.

**Assignment.**—No assignment of this Policy shall be binding on the Company until it be filed with the Company at its Home Office. The Company, by receiving or filing any assignment, does not assume any responsibility as to validity or sufficiency thereof. Any claim made under an assignment shall be subject to proof of interest and extent thereof.

**Indebtedness.**—Any indebtedness to the Company on account of or secured by this Policy will be deducted from any payment or any settlement hereunder.

**Reserve Basis.**—The reserve for this Policy shall be computed upon the American Experience Table of Mortality and  $3\frac{1}{2}\%$  interest per annum.

**Reinstatement.**—Should this Policy lapse, it may be reinstated at any time before the expiry of the months during which consecutive renewals of the Policy could have been made as provided herein, upon presentation of evidence of insurability satisfactory to the Company and upon the payment of all premium arrears with interest at 6% per annum.

**Control.**—The control of this Policy shall be vested in the beneficiary absolutely.

COPY OF APPLICATION





[fol. 430] IN UNITED STATES CIRCUIT COURT OF APPEALS

ARGUMENT OF CAUSE.

April 20, 1942, (April term, 1942) cause came on to be heard on the motions and on the merits before Parker, Sofer and Dobie, Circuit Judges, and was argued by counsel and submitted.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER CORRECTING RECORD—Filed and Entered April 20, 1942

On Consideration of the suggestion of Fyke Farmer, counsel for L. H. Brooks, consented to in Open Court by the parties hereto and it appearing that the certified transcript of record in the case of L. H. Brooks, et al. v. Fidelity Assurance Association, et al., was by error omitted from the transcript of the record in this case.

It Is Ordered that said transcript of record in the above entitled case be corrected by filing and adding thereto said omitted record.

April 20, 1942.

John J. Parker, Senior Circuit Judge.

Note: The certified transcript of record in L. H. Brooks, et al., vs. Fidelity Assurance Association, et al., appears at page 4429 of the complete certified transcript of record.

IN UNITED STATES CIRCUIT COURT OF APPEALS

STIPULATION—Filed April 20, 1942

Counsel admit at the Bar of the Court that the license applied for shortly prior to April 1, 1941, was issued but was in possession of the Auditor of West Virginia on June 6, 1941, and that the check sent in payment therefor was returned without being cashed prior to June 6, 1941, and that the Company was not operating under said license at the time of the filing of these proceedings on June 6, 1941; and that the total number of riders sent out on December 31, 1940, which were signed by contract holders and re-

turned to the Company, was 9,802; and that the total number of Series B contracts with insurance clause on December 31, 1940, was 14,626.

J. Campbell Palmer, III, Rudolph K. Schurr, J. W. Rector, Ben C. Buckingham, H. Vernon Eney, Counsel for Appellants. Justin N. Reinhardt, John V. Ray, Counsel for appellee.

Approved April 20, 1942.

John J. Parker, Senior Circuit Judge.

[fol. 432] IN UNITED STATES CIRCUIT COURT OF APPEALS,  
FOURTH CIRCUIT

No. 4923

EDGAR B. SIMS, Auditor of the State of West Virginia, and Ex-Officio Insurance Commissioner of the State of West Virginia; Ross B. Thomas and H. Isaiah Smith, West Virginia State Court Receivers; Banking Commission of Wisconsin; Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for Debtor Corporator in and for the State of Iowa; John B. Gontrum, Insurance Commissioner of the State of Maryland; Dewey S. Godfrey, Missouri State Court Receiver; and L. H. Brooks, Trustee, Frederic Leake and A. L. Goldberg, Jr., Trustee, Appellants,

versus

FIDELITY ASSURANCE ASSOCIATION, a Corporation, Debtor,  
Appellee

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston

In Bankruptcy

(Argued April 20, 1942. Decided June 16, 1942)

Before Parker, Soper and Dobie, Circuit Judges

[fol. 433] James Ward Rector, Deputy Attorney General, State of Wisconsin; Fyke Farmer, Rickard H. Lauritzen, Assistant Attorney General, State of Wisconsin; J. Camp-

bell Palmer, III, and H. Vernon Eney (John E. Martin, Attorney General, State of Wisconsin; John M. Rankin, Attorney General, State of Iowa; Floyd Philbrick, First Assistant Attorney General, State of Iowa; Carl J. Stephens and Ben C. Buckingham; Guy B. Brown; Rudolph K. Schurr; Clarence W. Meadows, Attorney General of West Virginia, and Ira J. Partlow, Assistant Attorney General of West Virginia, on brief) for Appellants, and John V. Ray; Justin N. Reinhardt, Attorney, Securities and Exchange Commission; Homer Kripke, Special Counsel, Securities and Exchange Commission; T. C. Townsend and Dorr E. Warner (James R. Fleming; Townsend & Townsend; Hillis Townsend; W. J. Thompson; John T. Keenan, and Chester T. Lane, General Counsel, Securities and Exchange Commission, on brief) for Appellee.

OPINION—Filed June 16, 1942

SOPER, Circuit Judge:

The appeal in this case is from an order of the District Court of January 5, 1942, whereby the court approved the petition of Fidelity Assurance Association, a West Virginia corporation, praying for reorganization under Chapter X of the National Bankruptcy Act, and overruled certain motions to modify or rescind prior orders of the court with respect to the custody or control of securities deposited by the corporation with officials in fifteen states of the union. The appellants herein are intervenors in the bankruptcy proceeding, and include various state officials with whom the debtor had deposited securities, as required by state statutes, that is, the Auditor and Ex Officio Insurance Commissioner of West Virginia, the State Court Receivers in West Virginia, the Banking Commission of Wisconsin, the Commissioner of Insurance and Permanent Receiver [fol. 434] for the debtor in the State of Iowa, the Insurance Commissioner of Maryland, the State Court Receiver in Missouri, and certain contract holders in Tennessee. Since the Fidelity is now insolvent and its business operations have been discontinued, the appellants seek to uphold the authority of the state officials to apply the deposits in their custody for the benefit of local contract holders in accordance with the applicable state laws. A number of objections to the action of the District Judge are raised, but in the view we take of the case, it will be sufficient to consider only

two questions: (1) whether the Fidelity was an insurance company when the petition in bankruptcy was filed, and as such, was exempt from the provisions of the Bankruptcy Act; (2) whether the petition was filed in good faith within the meaning of that term in Chapter X of the statute.

The Fidelity was incorporated on April 11, 1911 in West Virginia, under the name of the Fidelity Investment and Loan Association, to buy, sell and deal in stocks, bonds and real estate. By charter amendment in November, 1912 its name was changed to Fidelity Investment Association and it was authorized to receive payments on annuity contracts in fixed installments or otherwise, and to sell certificates, bonds or other investment securities of any kind on the installment or any other plan of payment. Its original authorized capital of \$100,000 was increased to \$200,000 in 1912, \$500,000 in 1926, \$1,000,000 in 1929 and \$13,000,000 in 1931. The total outstanding stock on December 30, 1940 was \$911,000 of preferred and \$812,300 of common. Of the preferred, \$505,100 had been paid for in cash in that it was issued in exchange for annuity contracts surrendered by the holders and \$405,900 of preferred had been issued as dividends on the common stock. Of the common stock, \$195,873.34 had been issued for cash and \$616,426.66 had been issued as dividends on the common stock.

From November, 1912 to the end of 1940, the Fidelity was engaged in selling its own securities in the form of investment contracts variously known as annuities, installments or, more recently, face amount certificates, and in investing [fol. 435] the funds received from the purchaser. This activity brought the corporation within the scope of Article 9 of Chapter 33 of the Code of West Virginia which required every person or corporation engaged in this business in the State to secure a license from the Insurance Commissioner of the State and to deposit with the State Treasurer, in trust for the benefit of the contract holders, securities approved by the Insurance Commissioner in the sum of \$100,000; and in addition to maintain with the State Treasurer securities so approved equal in amount to the cash liabilities of the corporation under its contracts; provided that such additional deposits were not required to be made with respect to contracts sold in other states to the extent that the law of such states required deposits to be made therein for the benefit of local contract holders. Article 9 (5) of the West Virginia Code directed the Insurance Commis-



sioner to revoke the license of any corporation failing to make the required deposits and to suspend the license of any corporation if he should find that its liabilities exceeded its assets; and Article 9 (10) of the Code gave the Insurance Commissioner the same authority over every corporation engaged in selling annuity contracts as over insurance companies, and empowered him, if he should be of the opinion that the assets of such a corporation were impaired, or that it was not complying with the law, to revoke its license; and if so, to retain authority and control over the deposits until the total liability of all the contracts issued by the corporation in the state should be redeemed or settled. Similar provisions are found in the statutes of fourteen other states in which the Fidelity sold annuity contracts and made the required deposits \*. The Fidelity also [fol. 436] sold annuity contracts in fourteen additional states in which no deposit was required by law. In short, the Fidelity sold contracts in twenty-nine states and deposited securities for the benefit of the purchasers in fifteen states. The market value of the securities deposited in

*STATE	AMOUNT OF DEPOSIT AND LEGAL NATURE	STATUTE
Alabama	Amount set by Sec. Comm'r and held in escrow	Tit. 53, Sec. 12 Ala. Code
Delaware	\$100,000, up to 100% if required "in trust"	Ch. 66, Sec. 105 Rev. Code-Del., 1935
Illinois	\$50,000, 100% if required (100% was required) "for the benefit of Illinois contract holders"	Ch. 121½, Sec. 101-a, Rev. Stats. 1939
Iowa	100% of liability "guaranteeing faithful performance"	Ch. 392, Iowa Code 1939
Indiana	100% of liability "for benefit of" Indiana creditors	Ch. 45, Art. 12 Baldwin's Ind. Statutes
Kansas	100% of liability "for the benefit of" Kansas creditors	Ch. 17, Art. 10, Sec. 17-1033, Kans. Stats.
Kentucky	100% of liability "for protection of contractholders"	Ch. 72-a, Carroll's Ky. Stats. 1936
Maryland	100% of liability "in trust"	Art. 48-a, Sec. 18-234 Ann. Code, 1939
Missouri	100% of liability	Rev. Stats. Mo. 1939
Ohio	100% of liability "for the protection of investors"	Ch. 20, Sec. 696, Page's Ohio Code, Ann.
Pennsylvania	\$100,000 "as security for fulfillment of contracts"	Ch. 28, Tit. 7 Purdon's Pa. Stats.
Tennessee	100% of liability "for benefit of Tennessee creditors"	Pt. 1, Tit. 14, Ch. 4, Michie's Tenn. Code, 1938
Virginia	\$25,000 collateral trust in discretion of Sec. Comm'r	Title 34-a, Ch. 147-a, Va. Code 1936, Ann.
Wisconsin	Liability not to exceed 90% of deposit maintained in trust for benefit of local members	Sec. 216.01 Wis. Stats

each of the fifteen states as of June 6, 1941, when the pending suit was instituted, and the net cash liability of the Fidelity to the purchasers therein as of April 10, 1941 is shown by the following table:

State	Deposit by States as of June 6, 1941 Market Value	Liabilities by States as of April 10, 1941 Net Cash
Alabama	\$32,555.16	\$31,346.71
Delaware	293,790.63	290,175.36
Illinois	3,759,894.00	4,225,790.75
Indiana	162,863.44	386,173.45
Iowa	45,082.50	34,478.27
Kansas	83,337.50	108,784.89
[fol. 437]		
Kentucky	\$86,712.50	\$92,690.42
Maryland	470,806.25	492,552.24
Missouri	861,100.62	786,988.86
Ohio	509,573.44	2,360,418.70
Pennsylvania	232,591.57	4,668,582.25
Tennessee	196,574.38	200,504.97
Virginia	27,703.13	557,809.19
West Virginia	10,674,696.08	6,896,393.88
Wisconsin	2,619,399.07	2,342,978.73
	\$20,056,680.27	\$23,475,668.67

In addition, the Fidelity had undeposited securities of the market value of \$556,467.51 on June 6, 1941, and approximately \$500,000 in cash.

In addition, the Fidelity had undeposited securities of the market value of \$556,467.51 on June 6, 1941, and approximately \$500,000 in cash.

On April 10, 1941, 87,999 contracts were outstanding with a face amount of \$181,948,026.70 and cash liability of \$23,475,668.67. The contract holders reside in each of the forty-eight states, the District of Columbia and in foreign countries.

The Securities and Exchange Commission, pursuant to Section 30 of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. 792-4, undertook an investigation of the business of companies issuing face amount installment certificates, and made a report to Congress on March 13, 1940, in which one chapter was devoted to the Fidelity Investment Association. Based on this report Congress passed the Investment Company Act of 1940, 54 Stat. 789, 11 U. S. C. A. 80 (a), effective January 1, 1941, wherein it found that investment companies are affected with a "national public interest"; and enacted strict regulations to govern the sale of face amount certificates, that is, certificates, investment contracts or other securities which represent an obligation of the issuer to pay a stated sum at a fixed date

more than twenty-four months after the date of issuance, in consideration of the payment of periodic installments [fol. 438] of a stated amount. Upon the passage of this Act \*, it was immediately apparent that the Fidelity would be unable to comply with the regulations, especially as to the permissible sales load and the reserve to be maintained with respect to the issued contracts. To meet this situation, another change in the corporate charter was made on December 31, 1940 whereby its name became Fidelity Assurance Company, and its objects and purposes were stated to be "to issue insurance upon the lives of persons and every insurance appertaining thereto and connected therewith and to grant, purchase and dispose of annuities."

On January 24, 1941, the charter was again changed so as to reduce the authorized capital to \$1,000,000 of common stock of a par value of \$8 per share. The resolution authorizing the change in the charter stated that it was the desire of the company to transact life insurance business outside the State of West Virginia, and that in order to accomplish this purpose, it was necessary that the stock of the company should be common stock of one class and of such amount as would leave a surplus satisfactory to the insurance departments of the several states. 18,220 shares of the new stock were to be issued in exchange for 9,110 shares of the outstanding preferred stock, and 8,123 shares were to be issued in exchange for 8,123 shares of the outstanding common stock. No stock was in fact issued, cancelled or exchanged pursuant to this provision prior to the institution of the pending case.

During the greater part of the period covered by this corporate history, that is, from 1912 to 1940, the Fidelity was engaged in the sale of annuity contracts. These took several different forms, but they were similar in their essential provisions. The purchaser agreed to make monthly payments of a stated amount for the period of 120 to 132 [fol. 439] months, and the Fidelity agreed to return to the purchaser, after the expiration of the period and of an additional waiting period from 3 to 13 months, a stated sum

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\* Registration under this Act by companies doing business in the State was required by Ch. 46 of the Acts of West Virginia of March 8, 1941, effective 90 days thereafter, whereby Ch. 33 Art. 9 of the West Virginia Code was repealed. See W. Va. Code, Ch. 32, Art. 3.

of money known as the face amount of the contract in monthly, quarterly or annual installments, in accordance with one of the optional plans of settlement selected by the purchaser under the terms of the contract. Each form of contract contained detailed provisions as to payments, cash surrender value, lapses and optional plans of settlement. The net return on the investment, if the contract was fully performed, varied from 1.55 to 3.09%. No surrender value was provided until 10 to 16 monthly payments had been made. If the contract lapsed during this period, all payments made by the purchaser were forfeited to the company. The surrender value did not equal the amount paid in until payments had been made from 6 to 9 years. The report of the Securities and Exchange Commission (p. 111) shows that during the 10 year period from 1927 to 1936, the lapsed contracts amounted to 91 to 93%, and the matured contracts to 7 to 9%, and that the contracts which matured during this period amounted to only 14% of those in force at the beginning of the period.

Three types of contract were issued prior to 1921; another between 1921 and 1925, and a fifth between 1925 and 1932. During the last mentioned period the growth of the business was very rapid so that in 1932 the company had assets of \$25,000,000. The sales of contracts were greatly aided throughout the company's history by the confidence inspired by the deposit of securities under the laws of West Virginia and other states, and the salesmen of the company made constant reference to the security thereby afforded investors. In 1934 the Series B contract was first issued, and thereafter until the end of 1940, when the company ceased the sale of annuities, almost all the contracts took this form. It contained an optional insurance feature for an additional charge whereby in the event of the death of the purchaser before the maturity of the contract, funds were provided wherewith the contract would be paid up to maturity or the commuted value of a paid-up contract would be paid to the purchaser's estate. Seventy-five per cent of [fol. 440] the Series B contracts sold carried this feature, and a substantial number of the holders of the older contracts converted them into Series B contracts with insurance. The insurance was provided by a group insurance policy written by Lincoln National Life Insurance Company of Fort Wayne, Indiana. An older Series D contract was

still sold in Ohio, Kentucky and Alabama, since these states would not permit the sale of the Series B contract with insurance unless the company qualified to do business as an insurance company. Following the issuance of the Series B contract, the sales of the company stepped up greatly. \$16,000,000 face amount certificates were sold in 1935, \$25,000,000 in 1936, \$40,000,000 in 1937 and \$52,000,000 in 1938.

In December, 1938 the Securities and Exchange Commission filed a bill for injunction against the Fidelity in the District Court of the United States for the Eastern District of Michigan, alleging that certain practices of the company violated the fraud provisions of the Securities Act of 1933, 15 U. S. C. A. 77 (a) et seq.; and on December 22, 1938 a consent decree was entered whereby the Fidelity was enjoined inter alia from failing to meet the deposit requirements of the several states; from failing to maintain separate contract reserve funds or required reserves; from paying dividends except from earned surplus; and from obtaining money or property by making false or misleading statements. See S. E. C. Report 257. In the same month a suit for the appointment of receivers was brought by certain contract holders against the Fidelity in the Northern District of West Virginia based on the facts developed in the suit in Michigan; but the bill was dismissed in the District Court and this action was affirmed by this court on August 28, 1939 in *Hutchinson v. Fidelity Inv. Ass'n*, 106 F. 2d 431, as it was shown that the company was not then insolvent when its assets were appraised in accordance with the "sound value formula prescribed by the insurance Commissioner of West Virginia". These cases did not put an end to the company's activities, but they produced much unfavorable publicity and its business declined so rapidly in volume that in 1940 the total sales were less [fol. 441] than \$12,000,000 and by April 1941 the liabilities of the company exceeded the assets by \$2,500,000.

The force of these circumstances and the requirements of the Federal Investment Company Act of 1940 led the Fidelity to secure the change in charter on December 30, 1940 so as to authorize it to conduct a life insurance business. The company also paid for and obtained a license from the Auditor and Ex Officio Insurance Commissioner of West Virginia to do a life insurance business in the state for the period ending March 31, 1941. Proposed forms of new



annuity and life insurance policies were filed with the Insurance Commissioner of West Virginia pursuant to requirements of the state law as a condition precedent to the sale of such policies. An informal understanding or gentleman's agreement was reached with the Insurance Commissioner that the company would not sell insurance policies or annuity contracts until he gave it permission, but might continue to collect installments on the annuity contracts then in force. Application for a renewal of the license for the year beginning April 1, 1941 was made by the company in due course but the Commissioner withheld it and shortly thereafter directed the company to cease business.

In the meantime, however, the company had issued a substantial number of policies of insurance in the following manner, without requiring payment from the insured. At the meeting of the Board of Directors on December 31, 1941 it was determined that the Fidelity should agree to assume the insurance risks involved in the majority of the Series B contracts, and accordingly duplicate riders were sent to all of the holders of such contracts to the number of 14,626; and of these 9,802 signed riders and returned one to the company, whereby it assumed the obligations of the insurer, as set out in the contract. The company continued to pay the premiums on the group policy issued by the Lincoln National Life Insurance Company so as to continue it in force.

On April 4, 1941, the Auditor of West Virginia directed (fol. 442) the Fidelity to discontinue business and to segregate payments thereafter made by contract holders. On April 11, 1941 he filed a bill in the Circuit Court of Kanawha County, West Virginia, pursuant to Chapter 33, Article 2, Section 45 of the State Code which provided that whenever any company under the supervision of the Insurance Commissioner should become insolvent, the auditor might file a suit and take possession of its property and distribute its assets amongst the persons entitled thereto. The Fidelity appeared in this suit but filed no objection and receivers were appointed by the court. They took possession of the cash and undeposited securities, but not the securities in the hands of the State Auditor. That official notified the proper officials in other states, and proceedings were instituted in Indiana, Ohio, Illinois, Tennessee, Kansas, Kentucky, Missouri, Pennsylvania, Iowa and Maryland. In Wisconsin, the Banking Commission promptly proceeded to administer

the company's affairs, as provided by the state law, received claims from 6,000 local contract holders and realized the sum of \$1,259,244.04 by the sale of deposited securities at prices in excess of the company's valuation of December 31, 1940.

On June 6, 1941, the Fidelity filed a petition in the instant case alleging insolvency and prayed for reorganization under Chapter X of the Bankruptcy Act. On the same day the District Judge entered an ex parte order wherein the petition for reorganization was approved, a trustee for the debtor was appointed and the West Virginia receivers and other persons were enjoined from disposing of any of the debtor's property and the state receivers were directed to turn over all the property in their hands to the trustee. On June 10, 1941, by another ex parte order all state officials in West Virginia and in other states were directed to deliver to the trustee all property of the debtor in their hands. The West Virginia receivers turned over the property in their hands under protest and the Ohio receiver turned over to the trustee without protest the property of the debtor in his possession. The state officials generally retained possession of the deposits in their custody.

[fol. 443] The auditor and the West Virginia receivers immediately appealed from these orders to this court. On August 9, 1941 the District Court modified the orders of June 6 and 10th by eliminating the turnover provisions, so that they merely enjoined the receivers and the Insurance Commissioners from selling or otherwise disposing of any of the assets of the debtor in their possession. Since the receivers and state officials of a large number of states were affected by the injunction order, but only those from West Virginia were parties to the appeal, and since a number of questions going to the jurisdiction were raised and the record was fragmentary, we declined to pass upon the questions involved and affirmed the interlocutory order without prejudice to the rights of the appellants or any other parties to the proceeding in the District Court with respect to any question there pending. See *Sims v. Central Trust Co.*, 123 F. 2d 89. Subsequently the Insurance Commissioners and officials of other states and receivers appointed by state courts were permitted to intervene and file answers controverting the allegations of the petition. The Security and Exchange Commission intervened at the request of the

court. After extended hearings, the order appealed from was filed.

We first consider the contention that the petition in bankruptcy should be dismissed because at the time it was filed in the District Court, the Fidelity was an "insurance corporation" within the meaning of Section 4 of the Bankruptcy Act, as amended by the Act of June 25, 1910, 36 Stat. 839, 11 U. S. C. A. 22. Thereby municipal, railroad, insurance and banking corporations are excepted from the provisions and benefits of the Act. The District Judge held that the Fidelity was not an insurance company within this exception, and was therefore entitled to file a petition for reorganization under Chapter X of the statute. His view was that in determining such a question, the charter of the corporation must first be examined, and if it appears that it is authorized thereby to engage in the excepted field and actually conducts its principal business in that field, it is excluded from the purview of the Act; but if the charter [fol. 444] also authorizes the corporation to do business in other fields, and all of the business is done in these fields, then the corporation is not an insurance company and is entitled to file a petition in bankruptcy. Finding as a fact that the Fidelity had never issued any insurance contracts but had been engaged only in selling annuities, he concluded that it was not an insurance corporation.

It should be noted at this point that, for some reason that is not entirely clear, the attention of the District Judge was not called to the fact now admitted, that after the Fidelity amended its charter and secured a license on December 31, 1940 to engage in the business of life insurance in West Virginia, it issued 9,802 contracts of insurance prior to April 1, 1941 in the manner above described. Since it issued no other new contracts of any kind during this period, but merely supervised its old outstanding annuity contracts, it is by no means certain that it did not fall within the statutory exception even under the rule of law announced by the District Judge. But this question need not be decided now, for, in our opinion, the scope of the provision by which municipal, railroad, insurance and banking corporations are excepted from bankruptcy proceedings is to be determined in any case by the classification of the corporation under the law of the state of its creation rather than by the character of its predominant business activity.

It must be borne in mind that we are not now dealing with the inclusive words of Section 4 of the Bankruptcy Act, but with words of exception, and that the considerations which determine the content of one class do not necessarily apply to the other. From time to time Congress has changed the description of the persons or corporations to whom the privileges of bankruptcy may be accorded. Thus the provisions of the Act of 1867, §37, 14 Stat. 535, were made applicable to moneyed business and commercial corporations; and these words were interpreted to include railroad companies, insurance companies and banks, while excluding municipalities. The Act of 1898, 30 Stat. 547, changed the description of the included class and granted the privilege of bankruptcy to corporations engaged principally in manu-[fol. 445] facturing, trading, printing, publishing, mining or mercantile pursuits; and it was under this Act that the courts held that the susceptibility to bankruptcy of a corporation does not depend upon its charter, but upon what it actually does. See, *In re Kingston Realty Co.*, 2 Cir. 160 F. 445; *Cate v. Connell*, 1 Cir., 173 F. 445. These decisions were especially persuasive in considering a statute whose criterion was the business in which the debtor was "engaged principally", but they have been cited in more recent cases and are relied upon by the appellee in the pending case with little reference to the change of verbiage in Section 4 of the Act that has subsequently taken place. See, *In re Dairy Marketing Ass'n. of Fort Wayne, D. C. Inc.*, 8 F. 2d 626; *In re Roumanian Workers Educational Ass'n.*, 6 Cir., 108 F. 2d 782.

The test established by the Act of 1898 excluded railroad, insurance and banking corporations, but it gave rise to difficulties of legal definition and controversies of fact that impeded the administration of the law; and therefore the Amendment of 1910, now contained in Section 4 of the Act, restored the words of the Act of 1867 and with certain exceptions again made bankruptcy available to "any moneyed, business or commercial corporation". We may assume for the purposes of the pending case that when a bankruptcy court is called upon to decide whether a corporation debtor is a moneyed, business or commercial corporation within the general phrase, it should ascertain what has been the principal business of the debtor and be governed accordingly. See, *In re Wisconsin CoOperative Milk Ass'n.*, 7 Cir., 119



F-2d 999; *Finletter*, *The Law of Bankruptcy Reorganization*, pp. 107-9; *Gerdes* 1 *Corporate Reorganization*, 165. But we must still determine what reasons led Congress to exclude municipal, railroad, insurance and banking corporations from the purview of the Act, and what interpretation should be given to the excepting clause. Had it not been for this clause, railroad, insurance and banking corporations would again have become subject to bankruptcy by the restoration of the inclusive words of the Act of 1867. [fol. 446] The purpose of the exclusion, we think, was correctly described by Judge Sibley in the following passage from *In re Supreme Lodge of the Masons Annuity*, D. C. N. D. Ga., 286 F. 180, 184, which has found wide acceptance in the federal circuits:

“ \* \* \* No reasons for making these exceptions were assigned by the committees of Congress, but they may be surmised to lie in the public or quasi public nature of the business, involving other interests than those of creditors, in the desirability of unarrested operation, the completeness of state regulation, including provisions for insolvency, and the inappropriateness of the bankruptcy machinery to their affairs.

These considerations all apply to insurance corporations. That the business generally may be declared affected with a public interest and subject to extensive regulation was recognized in *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 412, 34 Sup. Ct. 612; 58 L. Ed. 1011, L. R. A. 1915 C, 1189. All states, probably, have in fact regulated insurance companies of all kinds, and provided for their liquidation. The affairs of an embarrassed or insolvent insurance company often require much technical skill and judgment and time for their adjustment and a carrying forward of the business, to prevent lapses and to permit reinsurance to simplify them. And considering the variety of insurance obligations assumed and the various statutes thereof, a chief practical difficulty is the ascertainment of who are really to be considered creditors and in what amounts, often requiring much time and elaborate accounting for its solution. Under such circumstances even the election of a trustee in bankruptcy could be difficult, and a creditors' meeting could hardly prosecute any business, owing to conflicting interests of the various classes of claims.”



This view was again expressed in the same circuit (5th) in *Woolsey v. Security Trust Co.*, 5 Cir., 74 F. 2d 334, 337. The court said:

"The letter of that section excludes banking and insurance corporations; its spirit and purpose, to leave the liquidation of the banking corporations of the country to the well organized departments of the states and the nation, organized for the purpose of supervising while they are going concerns and of liquidating them when they are not, [fol. 447] excludes them. Federal laws provide elaborately for the supervision and liquidation of national banking corporations; the laws of the states do the same for state banks and insurance companies, in order to protect the millions of persons who deal with them on the faith of the protection afforded by direct governmental supervision and control. It was considered that it would be a ruinous thing to the state, to the depositors, and to the creditors to have the elaborate scheme of liquidation which the state provides broken into and nullified by bankruptcy proceedings, and it was intended, by withdrawing jurisdiction over these corporations from the bankruptcy court, that this would not occur. It would be directly contrary to the purposes so definitely and comprehensively expressed, to exempt banking corporations from the act, leaving their administration and liquidation to the state and federal systems devised expressly for them, to hold that this bank and trust company is not exempt, chartered though it was under the state banking laws, with banking privileges and powers, operated though it was under those laws, and now being liquidated, as it is, under them".

See also, *Grand Lodge, Knights of Pythias v. O'Connor*, 5 Cir., 95 F. 2d 474.

The interpretation of the exceptions has been outlined in other decisions where it has been pointed out that since Congress did not define the characteristics of the excepted corporations, the state statutes must be looked to in each case in order to determine the correct classification. Thus in *In re Union Guarantee & Mortgage Co.*, 2 Cir., 75 F. 2d 984, 985, the court said:

"The purpose of the exception is not self-evident; we must infer it as best we can from such similarity as exists between the excepted groups. All except municipalities are

companies for profit whose businesses are now generally regarded as 'affected with a public interest'; that is to say, as touching enough persons who must deal with them at some economic disadvantage, to require public supervision and control. And municipalities are even more directly within public control. The most natural inference is that Congress meant to leave to local winding up statutes the liquidation of such companies that, since the states commonly kept supervision over them during their lives, it was reasonable that they should take charge on their demise. [fol. 448] *Columbia, etc. Co. v. South Carolina*, 27 F. 2d 52, 59 A. L. R. 665 (C. C. A. 4); *In re Grafton G. & E. Co.* (D. C.) 253 F. 668. Cf. *In re Hudson River Power Co.*, 183 F. 701, 33 L. R. A. (N. S.) 454 (C. C. A. 2). Now it is the powers conferred upon the company, not its activities, which are decisive. *Gamble v. Daniel*, 39 F. 2d 447 (C. C. A. 8); *Clemons v. Liberty Savings, etc. Co.*, 61 F. 2d 448 (C. C. A. 5). So far as *In re Supreme Lodge of Masons Annuity* (D. C.) 286 F. 180, holds otherwise it cannot be accepted. If a state enacts that companies having powers of a prescribed kind must be regulated, that is of course authoritative; and, if in addition it classes the company as a bank or a railroad or an insurer, that too should be authoritative. *Kansas v. Hayes*, 62 F. 2d 597, (C. C. A. 10); *Security B. & L. Ass'n. v. Spurlock*, 65 F. 2d 768 (C. C. A. 9). This is true, not because Congress was bound to yield in such cases, but because otherwise its apparent purpose to leave the winding up of such companies to the state would not be effected; for the will of the state is no clearer to supervise the company than to class it as it does. When Congress excepted not all companies affected with a public interest, but specified kinds of such company, presumably it intended the states to define the kinds.

• • • What Congress meant by an insurance company in the income tax law has nothing to do with its meaning in the Bankruptcy Act. It is true that this makes the meaning of Section 4 depend upon local laws and subjects that meaning to change as those laws change; pro tanto, Congress has delegated its power. But this is not the only instance in the Bankruptcy Act; thus exemptions are dependent upon local law, section 6, 11 U. S. C. A. § 24, and so are the priorities among claims, Section 64 b (7) as amended, 11 U. S. C. A. § 104 (b) (7). *Hanover National*

Bank v. Moyses, 186 U. S. 181, 22 S. Ct. 857, 46 L. Ed. 1113; Stellwagen v. Clum, 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507. It is by no means true that Congress may in no circumstances delegate its powers to the states, provided that in the mean the resulting system be uniform.”

In *State of Kansas v. Hayes*, 10 Cir., 62 F. 2d 597, 599, the court said:

[fol. 449] “It is thus seen that under the many provisions of the statutory law of this state trust companies are made banking corporations. That it was not intended by the Legislature of the state that trust companies should be operated, or, in case of insolvency, the affairs of such corporations should be wound up in bankruptcy, the assets converted into cash and distributed under the provisions of the Bankruptcy Act, and that a discharge of the corporation, and its stockholders and directors should be granted from its remaining indebtedness. Of course, it is undoubtedly within the power of Congress to make trust companies of the state, or any other natural or corporate body, or unincorporated company subject to the National Bankruptcy Act, and, if this were done in clear and unequivocal terms, all state laws for their operation in conflict with the act must then be held to yield to the higher force, the national law. But, in the absence of any such express provision of the National Bankruptcy Act, in view of the state laws to which we have referred, and others, it must be held, we think, the provisions of the National Bankruptcy Act do not apply.”

Like reasoning was employed in interpreting the meaning of the exception of building and loan associations from bankruptcy by the Act of February 11, 1932, 47 Stat. 47. With respect to this additional exception, it was said in *Security Building & Loan Ass'n v. Spurlock*, 9 Cir., 65 F. 2d 768, 770-1:

“• • • It is suggested that this phrase, ‘building and loan association’ might well be interpreted uniformly by

\* The statement in *In re Supreme Lodge of the Masons Annuity*, 286 F. 180, 183, that a corporation, which is an insurance corporation in the meaning of Congress is such in every state, regardless of the name locally attributed to it, is expressly disapproved in this decision, and is also impliedly disapproved in the later decision in the Fifth Circuit cited above.

the federal courts in exercising bankruptcy jurisdiction disregarding the definition thereof by the authorities of the individual states whether such definition is legislative or judicial, and that, consequently, we must seek for a reasonable definition of a term of general application and then determine whether the local legislation authorizes the incorporation of such a building and loan association and also whether the alleged bankrupt is such a corporation or association. However desirable such a conclusion might be, the fact is that a building and loan association is entirely a creature of state statute and the statute authorizing its creation must necessarily define its characteristics. Consequently, we must look to the state statutes to determine the nature and character of the corporate organizations it authorizes to function as building and loan associations. If may be conceded that the mere name of 'build- [fol. 450] ing and loan association' would not control in the determination of the question as to the character of the corporation, although the fact that the corporation is designated in its name and in its articles of incorporation as a building and loan association is certainly persuasive, if not controlling, evidence of its character.

• • • when Congress enacted this legislation without any attempt to define the characteristics of the building and loan associations intended to be excluded from the operation of the Bankruptcy Act, it necessarily recognized the various definitions thereof in the statutes of the several states as indicating what constitutes a building and loan association in the respective states. To attempt by judicial construction to incorporate into the federal law some definition of a building and loan association would be in effect to legislate upon that subject. Congress was satisfied to take the state statutes as they found them and we must do so."

These authorities establish the rule that in determining whether a corporate debtor is a member of the excepted classes, the provisions of the state law must be given predominating influence. This is not to say that the classification of a state statute must be followed literally in every instance without any regard whatsoever to the real activity of the corporate body. The course of decisions, even in the Second Circuit, where perhaps the rule of state classi-



fication has been most strongly stated, indicates that the spirit rather than the letter of the local statutes should prevail; *In re Prudence Co.*, 2 Cir., 79 F. 2d 77. — *Empire Title & Guar. Co. v. United States*, 2 Cir., 101 F. 2d 69; and the mere fact that a state may have provided for state supervision and liquidation of a kind of corporation does not of itself bring them within the excepted class. *In re Prudence Co.*, *supra*; *Capital Endowment Co. v. Kroeger*, 6 Cir., 86 F. 2d 976.

Exclusion of the debtor from bankruptcy in the pending case does not call for an extreme or literal application of the rule of state classification. It is true that for many years the debtor dealt exclusively in the sale of annuity contracts and assumed the status of a life insurance company only a short time before the receivership under a [fol. 451] stress of circumstances that finally put an end to its business altogether. But the change was actually made, and the debtor did engage in the business of life insurance during its last three months of activity by the issuance of thousands of life insurance policies, while continuing to a limited extent its annuity business. This combination of activities is precisely that which a life insurance company in West Virginia is authorized to perform by Chapter 33 Article 3 Section 7 of the West Virginia Code, which is as follows:

“Life insurance companies chartered by and doing business in this state, and empowered to make contracts contingent upon life, may grant and issue annuities, either in connection with or separate from contracts of insurance based upon life risks, and all such annuities heretofore issued by such companies shall be valid.”

There can be no doubt, therefore, that the Fidelity, by reason of its twofold activities, should be classified as an insurance company under the West Virginia law. Since the company deliberately assumed this new character to escape the requirements of the new federal and state statutes with respect to annuity companies, no weight should be given to the company's attempt to pose as an annuity company in the pending petition in bankruptcy. Moreover, the corporation would have been classed as an insurance company under the laws of the majority of the states as they existed



in 1910, when the excepting clause in the Bankruptcy Act was passed. At that time, the laws of twenty-eight states\*, including West Virginia, classified a life insurance company as a corporation formed to insure the lives of persons and to grant, purchase and dispose of annuities; and since 1910, [fol. 452] seven additional states\*\* have amended their statutes to include a like provision. The conclusion is that the Fidelity was an insurance company in 1941, whether its

\*Revised Statutes of Arizona (1901) Title 13, Ch. 3, Insurance Corporations, §797; California Political Code (1909) §594; Colorado Rev. Stat. (1908) §3116, p. 841; General Statutes of Connecticut (1902) §3540; Revised Statutes of Illinois, Hurd (1909) Ch. 73, Insurance, §177; Burns' Annotated Indiana Statutes, Revision of 1908, Vol. 2, §4678; General Statutes of Kansas, Dassler, (1909), §4111; Statutes of Kentucky, Russell (1909) Life Insurance and Life Insurance Companies, Art. 7, §4366; Marr's Annotated Revised Statutes of Louisiana, Vol. 2, p. 1217; Public General Laws of Maryland, (1904) Vol. 1, Art. 23, §148; General Laws of Massachusetts (1921) Vol. 2, Ch. 175, §118; Compiled Laws of Michigan, (1915) Vol. 2, p. 3375; Revised Laws of Minnesota (1905) §1687; Mississippi Code (1906) §2598; Revised Statutes of Missouri (1909) Vol. 2, §6895; Revised Codes of Montana (1907) §4016; Compiled Statutes of New Jersey (1709-1910) Vol. 2, p. 2838; "Act of Mar. 17, '09; L. '09; C. 48, §25" New Mexico Statutes Annotated (1915) §2846; Consolidated Laws of New York (1909) Vol. III, Art. 2, §70; Revisal of 1905 of North Carolina, Vol. 2, §4773; Revised Statutes of Ohio (1910) Vol. 2, §9339; Compiled Oklahoma Statutes, (1921) §6666; Lord's Oregon Laws (1910) Vol. 2, §4629; Brightly's Digest of Laws of Pennsylvania (1893-1903) p. 342; Vernon's Sayles' Texas Civil Statutes (1914) Vol. 3, Article 4724; Remington & Ballinger's Annotated Codes and Statutes of Washington, Vol. 2, §6123; West Virginia Code (1907 Supp.) §1107 a 17; Wisconsin Statutes (1911) §1897.

\*\*Digest of Statutes of Arkansas (1937) Pope, Vol. II, Sec. 7647; Idaho Code Annotated (1932) Title 40, secs. 301, 304; Code of Iowa (1935) Ch. 398, sec. 8673-el.; Public Laws of New Hampshire (1926) Vol. 2, Ch. 272, sec. 1, III; Revised Statutes of Utah (1933) Title 43, Ch. 3, sec. 2 (1); Public Laws of Vermont (1933), Ch. 277, Insurance Companies, sec. 6911; Wyoming Revised Statutes (1931) Ch. 57, sec. 223.

classification as such depends upon the statutes of West Virginia or upon the classification which prevailed generally amongst the states of the union when the Amendment was enacted. That Amendment excludes the corporation from the benefits of the Bankruptcy Act.

This conclusion leads very easily to a consideration of the contention of the appellants that the petition in bankruptcy should be dismissed under Section 144 of the Chandler Act, 11 U.S.C.A. 544, for the additional reason that it was not filed in good faith as that term is employed in Section 146 of the Act, 111 U.S.C.A. 546. Section 144 provides that if a controversial answer is filed by any creditor to the petition, the judge shall determine the issues presented and enter an order approving the petition if satisfied that it complies with the requirements of Chapter 10 and has been filed in good faith, or dismissing it if not so satisfied.

Section 146, insofar as material here, provides:

"Without limiting the generality of the meaning of the term 'good faith', a petition shall not be deemed filed in good faith if—

[fol. 453] "(1) . . .

"(2) . . .

"(3) it is unreasonable to expect that a plan of reorganization can be effected; or

"(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding."

Our attention is drawn to Section 146 (4) and to the question whether the interest of the contract holder will be best served by the continuance of the receivership proceeding instituted in the Circuit Court of Kanawha County in April 1941. In considering this question the discussion will be limited to the interests of the creditors, for it is apparent that the stockholders have no interest in the business. Commenting on the condition of the company's business, the District Judge said in his opinion: (*In re Fidelity Assur. Ass'n.*, 42 F. Supp., 973, 985-6)

"The proceedings are not yet at a stage where the court is called upon to consider any particular plan of reorganiza-

tion. It is true that the broad picture developed by the testimony at the hearing does not present a very favorable view with respect to the rehabilitation and continued operation of the Debtor as a face amount certificate company. Whether the Fidelity plan is fundamentally unsound depends upon the definition given to that term. It is apparent that it is a plan of investment which yields a very low rate of income to the investor and subjects the investor to substantial loss should he cease to pay the required installments during the earlier stages of the contract; but this very element of weakness from the investor's standpoint strengthens the company from an operating viewpoint, provided the contracts can be sold in sufficient volume to take care of necessary overhead expenses. It is extremely doubtful whether, in view of unsettled economic conditions and the critical international situation, the Fidelity plan would any longer appeal to a large public; but it is not impossible; and it is not the duty of the court to decide for the public that investors will not or should not buy these contracts in the future.

The fact that the company has not been operated profitably [fol. 454] in the past is not shown to be the result of financial unsoundness in the plan itself. It has been due rather to an unsoundness in Debtor's methods of management. Extravagant sales and promotion expenses; useless expenditures for lavish offices, including the home office building at Wheeling, West Virginia; overexpansion, particularly in states like Wisconsin, where the strictness of regulatory state laws made it impossible to operate at a profit; poor judgment in selection of the personnel to manage the company; these are the elements of unsoundness which have brought about the difficulties in which Debtor now finds itself.

The requirements of the Investment Company Act of 1940, establishing 7% of the total amounts paid in on contracts during their entire life as the maximum loading charge, are calculated to make the contracts more saleable, and, with proper economy and good judgment on the part of the management, a reasonable profit to the operating company is possible. This regulatory law has not had the effect of banishing all such companies from the region of commercial operation. The testimony discloses that at least one other such company is still in operation, presumably with some measure of success.

To conclude that unfavorable publicity concerning the affairs of any company must affect that company's prospects of future operation after being reorganized under Chapter X is to lose sight of the very purpose of such a reorganization. All the unfavorable publicity has been directed towards the unreorganized company. What I have said above concerning the reasons for the company's present financial condition indicates that in my opinion such unfavorable publicity has been amply justified; but it does not follow that if and when the company may be reorganized under the supervision of a United States Court it would retain any of the stigmata which it is the purpose of such reorganization to remove."

This resume of the District Judge presents a dark picture of the company's future. Nevertheless it suggests that some plan of reorganization not yet formulated,\* much less [fol. 455] proposed by any person financially able to carry it into effect, may not be impossible. We think it is our duty to review the situation realistically, and when this is done, there appears to be no reasonable hope of a reorganization of the business as a going concern, but only the immediate need of a liquidation of the company's assets for the benefit of the contract holders. Obviously there will be nothing left for the stockholders.

This conclusion is based in part upon the facts summarized in the quotation from the judge's opinion. For years past the business has not been profitable. In 1933 the company's liabilities exceeded its assets by \$7,000,000. It recovered from this condition to such an extent that when the pending suit was filed in 1941, the unfavorable balance had been reduced to two and a half millions, and this was due in part to the rise in value of the company's securities and in part to the large increase in sales of annuities from an intensive sales campaign. But the improved situation was shattered when the suits were filed against the company in Michigan and in West Virginia in 1938 and 1939, and the company reaped a harvest of unfavorable publicity deservedly based upon its mismanagement and irregular

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\* Some memoranda looking toward the formation of plans have been prepared but they do not purport to represent the proposal of any of the interested parties or to be sufficiently definite for submission to the creditors



transactions. The result was that a gross business of \$52,000,000 in 1938 shrank to less than \$12,000,000 in 1940, and the company was then losing money at the rate of \$250,000 per year. Not a single contract has been sold since December 31, 1940 and the sales force upon which the life of the business depended has been dissipated and could be restored only at a cost of \$500,000. Moreover, as the District Judge point- out, it is quite doubtful whether this form of investment presents any further appeal to a public that has now been informed as to the nature of the business;\* certainly the possibility that thousands of contract holders [fol. 456] could be persuaded to modify their contracts and scale down their claims to enable the company to go on is so remote as to exist only in the imagination. No proposal for the investment of new capital has been forthcoming. The facts underlying the whole situation are so clear that even the parties in this case who insist upon reorganization under the Bankruptcy Act hold out little hope of a resumption of the business as a going concern, and content themselves for the most part with the argument that reorganization in the statutory sense includes "a slow and orderly liquidation".

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\* The S. E. C. report (p. 113) compares the experience of a Series B contract holder without insurance with the experience of a holder of United States Savings Bonds over a period of ten years, based in each instance upon an investment by a purchaser of \$100. The report states: "Throughout the 10 years of the comparison, the amounts recoverable to investors at any time are in favor of the United States Savings Bonds, the percentage of advantage ranging from 184.2% in the first year to 49.3% in the second year to 0.3% in the tenth year. Significant, too, is the fact that the United States Savings Bonds, bearing interest at the rate of 2.9% compounded semi-annually, have a greater aggregate value at the end of 10 years than the investment certificates of the Association, notwithstanding the "reserve fund" provisions of the certificates requiring the appropriation of installments received, less fixed but un-specified charges for administrative and agency expenses, together with interest thereon at 4½% compounded semi-annually. The difference shown by the comparison emphasizes the high costs deducted by the Association and borne by the purchasers of the certificates."



But, it is said that even if liquidation is inevitable, the interests of creditors would be best served by a retention of the case in the federal court. The argument is that in such event, the trustees would have title not only to the assets in West Virginia but also to the assets in all other states in which contracts were sold and deposits were made to secure them, that is, the trustee would have title not only to the ten million of deposits in West Virginia, but to the almost equal sum held by the authorities of the other states. Hence, it is said a more effective marshalling of assets and adjudication of claims could be had in the bankruptcy court than in the state court of West Virginia, since the receivers of the latter would have jurisdiction only over the assets in that state and would have no power under the established rule to bring suit to secure assets or surplus deposits held in other states. See, *Booth v. Clark*, 58 U. S. 339; *Great Western Mining Co. v. Harris*, 198 U. S. 561; *Lion Bonding Co. v. Karatz*, 262 U. S. 77. Such a surplus might occur, according to this contention, in one or more of the states, either because the deposits therein might exceed the total liabilities, or because the funds deposited to secure a certain form of contract might exceed the liabilities thereunder, [fol. 457] and in either case creditors whose claims have not been paid in full would be obliged to file claims in every state in which such a surplus might be found.

Again, we are asked to consider possibilities, without substantial showing, that such surpluses probably will be found in any state other than West Virginia. Moreover, these arguments relate primarily to the interests of creditors whose claims are not secured or are insufficiently secured by deposits in their respective states. The majority of these contract holders live in the states of Ohio, Pennsylvania and Virginia, which adjoin West Virginia. The claims of all of the unsecured contract holders must necessarily be filed in West Virginia for there only a substantial surplus will surely be found. It will be as convenient for creditors to file their claims in the state as in the federal court. It is true that the West Virginia receivers may not bring suits in other states to secure control of deposits there in excess of local needs; but if such surpluses exist, it may be assumed that they will not be improperly withheld. In the event of controversy, suits can be brought without great difficulty by ancillary receivers appointed by the courts of other states for the purpose.

It has not been and cannot be reasonably contended that the interests of the well secured creditors will be advanced by interfering with the state officials in the prompt liquidation and distribution of the securities in their hands. The liquidation in every state in which deposits were made will be subject to the supervision of established governmental departments, as well qualified for the business as the trustee in bankruptcy. There is every reason to believe that the liquidation under their supervision will proceed without needless expense in a careful and expeditious manner so as to save as much as possible for the contract holders. Certainly it would be unjust and unreasonable to delay the satisfaction of their claims in order that illusory hopes of reorganization may be entertained. That which serves the interest of this group will also be to the advantage of the creditors in such states as Illinois (liabilities \$4,225,790.— [fols. 458-459] market value of securities \$3,759,894), where the contracts are secured by a very substantial but insufficient deposit.

Moreover, it must be borne in mind that the rights of the contract holders in the several states must be determined in each instance by the local statutes, and that these statutes must be interpreted in accordance with the decisions of the state courts. It is no reflection upon the federal court to suggest that the state courts of the fifteen states are better qualified to construe and apply their own laws. Considerations of this kind were doubtless influential with Congress in excepting from the Bankruptcy Act those corporations, such as insurance, railroad and banking corporations, whose business during their active life and whose liquidation in case of insolvency are strictly regulated by state law. Indeed, in deciding that it is to the best interests of the creditors of the Fidelity that the proceeding in the state court of West Virginia be not superseded by the proceeding in bankruptcy, we are merely following the example set by Congress. See, *In the Matter of Poloma Estates, Inc.*, 2 Cir., 126 F. 2d 72.

The District Judge also referred in his opinion to the fact that one of the receivers appointed by the Circuit Court of Kanawha County, West Virginia, is a law partner of a director who served on the Board of the Fidelity for many years; and the suggestion is made that the state court receivers would not be likely to proceed diligently against the directors if an investigation should disclose the existence of

some liability on their part to the corporation's creditors. No specific facts are set out in this respect, but if such facts exist and the necessity for a proceeding against the directors should arise, we have no reason to suppose that the state court will not do its full duty in the premises.

Our conclusion is that the petition should be dismissed. The order of the District Court will be reversed and the case remanded for further proceedings consistent with this opinion.

*Reversed and Remanded.*

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[fol. 460] IN UNITED STATES CIRCUIT COURT OF APPEALS,  
FOURTH CIRCUIT

No. 4923

EDGAR B. SIMS, Auditor of the State of West Virginia, and  
Ex-Officio Insurance Commissioner of the State of West  
Virginia; Ross B. Thomas and H. Isaiah Smith, West  
Virginia State Court Receivers; Banking Commission of  
Wisconsin; Chas. R. Fischer, Commissioner of Insur-  
ance and Permanent Receiver for Debtor Corporation  
in and For the State of Iowa; John B. Gontrum, Insur-  
ance Commissioner of the State of Maryland; Dewey S.  
Godfrey, Missouri State Court Receiver; and L. H.  
Brooks, Trustee, Frederic Leake and A. L. Goldberg, Jr.,  
Trustee, Appellants,

vs.

FIDELITY ASSURANCE ASSOCIATION, a Corporation, Debtor,  
Appellee

Appeal from the District Court of the United States for the  
Southern District of West Virginia

DECREE—Filed and Entered June 16, 1942

This Cause came on to be heard on the transcript of  
the record from the District Court of the United States  
for the Southern District of West Virginia, and was argued  
by counsel.

On Consideration Whereof, It is now here ordered, ad-  
judged, and decreed by this Court that the decree of the  
said District Court appealed from, in this cause, be, and

the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Southern District of West Virginia, at Charleston, with direction to dismiss the petition in accordance with the opinion of the Court filed herein.

June 16, 1942.

Morris A. Soper, U. S. Circuit Judge.

[fol. 461] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Presented July 13, 1942

To the Honorable, the Judges of the United States Circuit Court of Appeals, Fourth Circuit:

Comes now Fidelity Assurance Association, a corporation, the Appellee in the above entitled cause, and presents [fol. 462] this, its petition for a rehearing of the above entitled cause, and in support thereof, respectfully shows:

1. It is respectfully represented and insisted that this Honorable Court erred in holding that appellee should be classified as an insurance company under the West Virginia law and was, therefore, not subject to the provisions of Chapter X of the Bankruptcy Act.

In concluding that appellee should be classified as an insurance company under the West Virginia law, this Honorable Court found that appellee after December 31, 1940, and prior to April 1, 1941, issued 9,802 contracts of insurance. This finding was based upon issuance of such number of so-called riders to certain annuity contracts issued by appellee prior to December 31, 1940, in connection with which the insurance undertakings were carried by the Lincoln National Life Insurance Company. After December 31, 1940, and until April 1, 1941, and thereafter, the Lincoln National Life Insurance Company continued to carry such insurance undertakings.

No evidence of the so-called riders was properly in the record. The order appealed from was entered by the District Court on the 5th day of January, 1942. No offer of

evidence relating to the so-called riders was made in the District Court.

The information pertaining to such so-called riders reached this Honorable Court through the petition of Edgar B. Sims, etc. et al., to this Honorable Court for a remand to the District Court for a rehearing thereon on the ground of newly discovered evidence, which petition was filed in this Honorable Court on the 20th day of April, 1942. This petition was filed after the time within which newly discovered evidence may be presented under Rule 59b, Rules of Civil Procedure.

[fol. 463] In response to said petition to remand, appellee filed with this Honorable Court on April 20, 1942, the affidavit of F. J. McNulty to the purpose and effect that the insurance undertakings of such annuity certificates were never assumed by appellee, but were at all times carried by the Lincoln National Life Insurance Company and that appellee at no time engaged in any insurance business.

It is respectfully submitted that if this Honorable Court seriously considered the presentation of the petition for a remand to the District Court and the representations therein with reference to such so-called riders, the cause should be remanded to the District Court for the full development of the facts with respect to and attendant upon the issuance of such riders and a finding by the District Court on the facts and law applicable thereto.

It is respectfully submitted that the statement of facts relating thereto embodied in the order entered by this Honorable Court on April 20, 1942, did not constitute a full and complete development of the facts with respect thereto.

2. The enactment of the Securities Act of 1933, creating the Securities and Exchange Commission, and the various amendments and additions thereto, the revision of the Federal statutes relating to bankruptcy, including the enactment of Chapter X—Corporate Reorganizations, and the enactment of the Investment Company Act of 1940, manifest a distinct departure from the principles of public policy previously prevailing with respect to the supervision and regulation of the financial affairs of business organizations affected with a public interest and the establishment of a National public policy with respect thereto.

The Securities Act, and the amendments thereto, and the Investment Company Act subject businesses of the



[fol. 464] character involved in this cause to Federal supervision and regulation, and section 29 of the Investment Company Act of 1940 expressly recognizes that a face amount certificate company may be a "debtor" within the provisions of the Bankruptcy Act.

These comparatively recent congressional enactments would seem to eliminate the application of any principles formerly applied to businesses of a public or quasi-public nature of this character suggesting or requiring state supervision and regulation, to the exclusion of Federal supervision and regulation, and the introduction of Federal supervision and regulation.

The Securities Act, with the amendments and the additions thereto, and the Investment Company Act have provided the Federal supervision and regulation, while Chapter X of the Bankruptcy Act, and the Investment Company Act of 1940, have provided, through the bankruptcy courts, the facilities for the reorganization of businesses of the character involved in this cause.

The high purposes of said acts, the Securities Act, the Investment Company Act and the Corporate Reorganization Act, will be largely defeated if the charter powers, as distinguished from the business actually transacted, be considered the criterion in determining what corporations are within the operation of said Chapter X—Corporate Reorganizations, suggesting the necessity that the exceptions therefrom be strictly construed, if the public is to derive the full benefits contemplated by such acts.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the United States District Court for the Southern District of West Virginia be, upon further consideration, affirmed or the cause be remanded to the United States District Court for the Southern District [fol. 465] of West Virginia for a full and complete presentation and development of the facts relating to the issuance of the so-called riders and for said District Court to make its proper findings of fact and conclusions of law with reference thereto.

Respectfully submitted, James R. Fleming, John V. Ray, Homer A. Holt, Counsel for Appellee.

[fol. 466] **CERTIFICATE OF COUNSEL**

We, John V. Ray and Homer A. Holt, counsel for the above named Fidelity Assurance Association, Appellee, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

John V. Ray, Homer A. Holt, Counsel for Fidelity Assurance Association.

[fol. 467] **IN UNITED STATES CIRCUIT COURT OF APPEALS**

**ORDER STAYING MANDATE PENDING PETITION FOR REHEARING—  
Filed July 14, 1942**

Upon the Application of Fidelity Assurance Association by its counsel Homer A. Holt and John V. Ray, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the action of this Court upon the petition for rehearing this day filed by Fidelity Assurance Association.

July 13, 1942.

John J. Parker, Senior Circuit Judge.

**IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH  
CIRCUIT**

[Title omitted]

**ORDER DENYING REHEARING—Filed and Entered July 22,  
1942**

This Court having at its June term, 1942, rendered its decision reversing the order of the said District Court appealed from in this cause, and the appellee having on July 13, 1942, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

[fol. 468] It Is Now Here Ordered by This Court that the rehearing asked for be, and the same is hereby, denied.

John J. Parker, Senior Circuit Judge. Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

## IN UNITED STATES CIRCUIT COURT OF APPEALS

## ORDER STAYING MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI—Filed and Entered July 22, 1942

Upon the Application of Fidelity Assurance Association by its counsel Homer A. Holt and John V. Ray, and Central Trust Company, Trustee for Fidelity Assurance Association, by its counsel T. C. Townsend and Hillis Townsend, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said Fidelity Assurance Association and the said Central Trust Company, Trustee for Fidelity Assurance Association, in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

It Is Further Ordered that the order of the United States District Court for the Southern District of West Virginia entered on August 9, 1941 be and hereby is modified as follows:

1. All cash, securities and other property heretofore deposited by Fidelity Assurance Association with various state officials and now in the possession and custody of state officials or receivers may be sold, invested, re-invested or kept uninvested as may be directed by state courts or [fol. 469] state officials having control, supervision, or jurisdiction over said funds. . Any state official or receiver making any change in investments pursuant to the provisions of this order shall give prompt notice thereof to the Central Trust Company, Trustee for Fidelity Assurance Association, but such notice shall be without prejudice and shall not be considered as a consent to the jurisdiction of the District Court of the United States for the Southern District of West Virginia, or of this Court, or as a waiver of any right or immunity asserted by such state official or receiver.

2. All cash, securities and other property now in the possession or custody of Central Trust Company, Trustee for Fidelity Assurance Association, may be sold, invested, re-

invested or kept uninvested as may be directed by the United States District Court for the Southern District of West Virginia.

3. All costs, expenses of counsel and other necessary expenses, including expenses of administration and of state court proceedings, but not including compensation for counsel or receivers, heretofore or hereafter incurred by or on behalf of state officials or receivers having possession or custody of cash, securities or other property deposited by Fidelity Assurance Association with state officials or heretofore or hereafter incurred by or on behalf of the parties appellant in this proceeding, may be paid out of the respective funds in the possession or custody of such state officials and receivers, such costs and expenses to be in such amounts as may be allowed by the state courts or state administrative officials having control, supervision, or jurisdiction over said funds.

4. All costs, expenses of counsel for Fidelity Assurance Association and counsel for Central Trust Company, Trustee for Fidelity Assurance Corporation, and other necessary expenses, including expenses of administration, but [fol. 470] not including compensation for counsel for Fidelity Assurance Association or Central Trust Company, Trustee for Fidelity Association, or compensation to Central Trust Company, Trustee, heretofore or hereafter incurred by or on behalf of said Debtor or its Trustee, or heretofore or hereafter incurred by or on behalf of the Debtor or its Trustee in this proceeding, may be paid out of the funds in the possession or custody of Central Trust Company, Trustee for Fidelity Assurance Association, such costs and expenses to be in such amounts as may be allowed by the United States District Court for the Southern District of West Virginia.

5. The Central Trust Company, Trustee of Fidelity Assurance Association, shall proceed as promptly as possible to compile and prepare lists of those persons holding contracts of the Debtor, on which there was a reserve value as of April 11, 1941, or which were not delinquent on that date. There shall be a separate list for each state in which contract holders resided, and such lists shall show the contract number, the date thereof, and face amount, the payments made

thereon, cash surrender value, reserve value and any net loan thereon, and the name and address of the contract holder. A copy of such list shall be furnished to any official of the state covered thereby or to any other person designated by a proper court of such state.

6. Each state court or state official having jurisdiction, supervision or control of cash, securities or other property deposited by Fidelity Assurance Association, may proceed to give notice to the contract holders, accept proof of claims, begin and continue necessary administrative work looking towards the future distribution of said funds, except that [fol. 471] no distribution shall be made to contract holders or other creditors.

John J. Parker, United States Circuit Judge, Fourth Circuit. Morris A. Soper, United States Circuit Judge, Fourth Circuit. Armistead M. Dobie, United States Circuit Judge, Fourth Circuit.

—, 1942.

The Central Trust Company, Trustee, Fidelity Assurance Association, Debtor, by counsel, and counsel for the West Virginia, Maryland and Tennessee appellants, acting for and on behalf of all appellants in so far as they are authorized, hereby consent to the conditions to the stay of mandate herein, as above set forth, without any of said parties in any way waiving any of their objections heretofore made, and without consenting to any jurisdiction over them not heretofore acquired, and without waiving any rights or immunities now existing in their favor or behalf.

John V. Ray, Homer A. Holt, Attorneys for Fidelity Assurance Ass'n. Hillis Townsend, Attorney for Central Trust Company, Trustee, etc. J. Campbell Palmer, III, Attorney for West Virginia Appellants. H. Vernon Eney, Attorney for Maryland Appellants. Fyke Farmer, Attorney for Tennessee Appellants.

July 22, 1942; certified copy of order staying mandate is transmitted to the Clerk of the District Court at Charleston, West Virginia.



[fol. 472] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

[Title omitted]

MOTION OF APPELLEE FOR MODIFICATION OF ORDER OF JULY  
22, 1942—Filed August 8, 1942

To the Honorable, The Judges of The United States Circuit Court of Appeals, Fourth Circuit:

Comes now Fidelity Assurance Association, a corporation, the Appellee in the above entitled cause, and moves that the order entered herein on July 22, 1942 be modified to the extent necessary to preserve the assets deposited by Fidelity Assurance Association with various state officials and now in the possession and custody of state officials or receivers in the form in which they now are except when sale, exchange, investment or reinvestment of a part thereof [fol. 473] is required in order to prevent loss to the estate of Fidelity Assurance Association pending the stay of the mandate of this Court, and that any such sale be made only on the recommendation of a recognized investment counselor.

In support of said motion the said Fidelity Assurance Association says that at the informal hearing in Charlotte, North Carolina, on July 13, 1942 on the application for stay of mandate counsel representing Edgar B. Sims, Auditor etc. stated that a few days prior thereto a meeting of the representatives of the various state officials and receivers who had possession of said deposits had been held in Charleston, West Virginia, and at said meeting it had been agreed that those holding the deposited securities would not sell them during the pendency of this case in the United States Supreme Court, and that if the decision of the Circuit Court of Appeals for the Fourth Circuit is sustained, another meeting of said representatives would be held at which plans for the sale of such securities in the most advantageous manner would be considered.

At said hearing, and in opposing a stay of mandate without a large bond, counsel for John B. Gontrum, Insurance Commissioner, stated that the injunction order entered by the United States District Court for the Southern District of West Virginia on August 9, 1941 should be modified so

as to permit the state officials and receivers having securities of Fidelity Assurance Association in their possession to sell any issues in which serious losses were threatened, to invest cash on hand and to reinvest the proceeds of any sales; and counsel for Fidelity Assurance Association stated he thought that orders entered by the District Judge were [fol. 474] sufficient therefor, but if they were not, he was of opinion that the estate of Fidelity Assurance Association should be preserved and protected by proper management of the securities, and if modification of the said order of August 9, 1941 was necessary therefor he was not opposed to it.

In the conference of attorneys present at the said hearing which was held in the afternoon counsel for Fidelity Assurance Association consented to the order which was later entered on July 22, 1942 in the belief that the object of the modification of the said order of August 9, 1941 was solely to permit the sale of a security to prevent an impending loss.

In considering the said order of July 22, 1942, with representatives of the Appellee and the Trustee, it became apparent that to those who did not have the benefit of the informal conference at Charlotte on July 13, 1942, the order of July 22, 1942 was not entirely clear and too broad in modifying the order of August 9, 1941, so that persons not familiar with the informal conference at Charlotte on July 13th might possibly interpret the order as authorizing a sale for liquidation rather than for conservation alone.

Counsel for Fidelity Assurance Association at once consulted counsel for Edgar B. Sims, Auditor etc. and requested that the proposed order be modified, and said counsel stated that he would have no objection to the following modification, to-wit, that the following words be inserted at the end of the first sentence of Paragraph 1, viz., "for the purpose of preserving and protecting the said deposits, but this order shall not be construed to authorize the sale and conversion of any securities into cash for the sole purpose of liquidation, and no sale of securities shall be made except for the purpose of preventing loss to the estate of Fidelity Assurance Association pending the stay of mandate."

[fol. 475] The said counsel for Edgar B. Sims, Auditor etc. agreed to submit the proposed modification to counsel representing the other Appellants, and pending an answer from him the order of July 22, 1942 was entered. Counsel

for Fidelity Assurance Association were under the impression that the said order would not be entered until an application in writing for stay of mandate was filed in this court, which they intended to file if the petition for rehearing was denied, and did not advise this court of their request for a modification of the proposed consent order other than by a letter to Judge Parker dated July 18, 1942, a copy of which is attached hereto, marked "Exhibit 1".

Counsel for other appellants have refused to consent to the suggested modification, as will fully appear from the following letters attached hereto as a part hereof:

Letter from John V. Ray to J. Campbell Palmer, III, dated July 17, 1942, marked "Exhibit 2."

Letter from J. Campbell Palmer, III to John V. Ray, dated July 20, 1942, marked "Exhibit 3."

Letter from John V. Ray to J. Campbell Palmer, III, dated July 20, 1942, marked "Exhibit 4."

Letter from John V. Ray to J. Campbell Palmer, III, dated July 21, 1942, marked "Exhibit 5."

Letter from J. Campbell Palmer, III to Judge Parker, dated July 22, 1942, marked "Exhibit 6."

Letter from H. Vernon Eney to John V. Ray, dated July 22, 1942, marked "Exhibit 7."

Letter from Ben C. Buckingham to J. Campbell Palmer, III, dated July 25, 1942, marked "Exhibits 8."

Letter from Judge Parker to John V. Ray and J. Campbell Palmer, III, dated July 27, 1942, marked "Exhibit 9."

Letter from J. Campbell Palmer, III to Judge Parker, dated August 1, 1942, marked "Exhibit 10."

[fol. 476] Counsel for Fidelity Assurance Association submit that the assets of Fidelity Assurance Association should be preserved during the stay of mandate in the form in which they now are unless it is necessary to change investments in order to prevent serious loss, which changes of investment should be made only on the recommendation of recognized investment counsellors; and that in order to guarantee such preservation of assets in their present form, as appears from the annexed letters, it will be necessary to restrict the modification of the injunction order of August

9, 1942 by an order of this Court which will modify the order entered by it on July 22, 1942.

John V. Ray, Homer A. Holt, Attorneys for Fidelity Assurance Association. Address: Kanawha Valley Building, Charleston, West Virginia.

[fol. 477]

EXHIBIT 1

July 18, 1942.

Hon. John J. Parker, U. S. Circuit Judge, Charlotte, North Carolina.

In re: Sims, Auditor etc. vs. Fidelity Assurance Association

Dear Judge Parker:

At the conference in your office on Monday, Mr. Palmer stated that representatives of the states in which deposits made by Fidelity Assurance Association are held had met and agreed that there would be no sale and conversion into cash of the securities of Fidelity Assurance Association pending any proceedings in the Supreme Court of the United States.

In the proposed Order to be entered staying the mandate, in the paragraph numbered one, we intended to authorize, those having custody of the deposits to make such sales, investments and re-investments as might be necessary to avoid losses during the pendency of such proceedings.

On reviewing the proposed Order, however, I have come to the conclusion that the authority to sell securities is now too broad, and I have discussed with Mr. J. Campbell Palmer, III a modification of the paragraph numbered one which will give effect to what I believe was the true intention of all of us who worked on the consent order.

The change I have suggested is satisfactory to Mr. Palmer, and he is going to consult his associates about it. I am enclosing a carbon copy of the letter I have written Mr. Palmer on the subject, and I trust that within the next few days Mr. Palmer and I will be able to write you on behalf of all the parties interested that the suggested change has been agreed to.

Very truly yours, (S.) John V. Ray.

Enc.

JVR:MLB.

[fol. 478]

EXHIBIT 2

July 17, 1942.

Mr. J. Campbell Palmer, III, c/o Koontz & Koontz, Union  
Building, Charleston, West Virginia.

In re? Case No. 4923. Sims, Auditor, etc. vs. Fidelity As-  
surance Association

DEAR MR. PALMER:

As I told you at our conference this morning, I think Paragraph 1 of the proposed Order to stay the mandate should be amended so as to provide that sales of securities pursuant thereto shall be limited to sales necessary to protect the estate.

You will recall that in the conference with Judge Parker at Charlotte, you stated that the representatives of states in which there are deposits had agreed that there would be no sale and conversion into cash of the securities deposited pending the proceedings in the Supreme Court of the United States. I think such a restriction should be in the Order staying the mandate, so I am writing to ask you that you and your associates join me in a letter to Judge Parker requesting that Paragraph 1 of the proposed Order be modified.

After further consideration of the change which you and I discussed and tentatively agreed upon this morning, I have come to the conclusion that it will accomplish what I have in mind. I suggest that the following words be inserted at the end of the first sentence of Paragraph 1, viz., "for the purpose of preserving and protecting the said deposits, but this order shall not be construed to authorize the sale and conversion of any securities into cash for the sole purpose of liquidation, and no sale of securities shall be made except for the purpose of preventing loss to the estate of Fidelity Assurance Association pending the stay of mandate."

[fol. 479] It may be well to set out Paragraph 1 as it would be as so amended:

1. All cash, securities and other property heretofore deposited by Fidelity Assurance Association with various state officials and now in the possession and custody of state officials or receivers may be sold, invested, re-invested or kept uninvested as may be directed by state courts or



state officials having control, supervision, or jurisdiction over said funds for the purpose of preserving and protecting the said deposits, but this order shall not be construed to authorize the sale and conversion of any securities into cash for the sole purpose of liquidation, and no sale of securities shall be made except for the purpose of preventing loss to the estate of Fidelity Assurance Association pending the stay of mandate.

I am sending you five carbon copies of this letter for your convenience in submitting the proposed change to Messrs. Eney, Farmer and the others.

I suggest that you request them to authorize you to join me in a letter to Judge Parker, which will ask that the proposed Order be so amended.

Very truly yours, (S.) John V. Ray.

JVR:MLB

[fol. 480]

EXHIBIT 3

(Letterhead of Koontz & Koontz)

July 20, 1942.

Mr. John V. Ray, Kanawha Valley Building, Charleston,  
West Virginia.

Re: Sims vs. Fidelity Assurance Association. Case No. 4923

DEAR JOHN:

I am returning to you the letters you sent me because the first sentence of your second paragraph is not strictly correct. I stated at the conference in Charlotte, that which the conference in Charleston had agreed to, and read you my letter to the conference members, which stated, in part: " . . . in that the funds are not to be immediately sold by any states, but only where there is a necessity for selling the deposited securities which may, or appear to be depreciating in value, or where there is a real opportunity for sale which might not soon again occur. All of us have agreed that we will be cautious in making any sales pending our later conference—after disposing of the matter in the United States Supreme Court, —."

This is the substance of what I told Judge Parker and what I spoke to you about, and I believe it should be pre-

sented in somewhat similar fashion rather than that I stated that "there would be no sale and conversion into cash of the securities deposited pending the proceedings in the Supreme Court of the United States."

I again say that I have no objection to the amendment as you have stated it, although I really cannot see where it will add anything, but will be glad to communicate it to the appellants.

Very sincerely, Koontz & Koontz, by (S.) J. Campbell Palmer, III.

JCP:H  
Enclosure

[fol. 481]

EXHIBIT 4

July 20, 1942.

Mr. J. Campbell Palmer, III, c/o Koontz & Koontz, Union Building, Charleston, West Virginia.

In re: Case No. 4923, Sims, Auditor etc. vs. Fidelity Assurance Association

DEAR MR. PALMER:

As I told you at our conference on July 17th, I think Paragraph 1 of the proposed Order to stay the mandate should be amended so as to provide that sales of securities pursuant thereto shall be limited to sales necessary to protect the estate.

From the statements made by you and your associates in the conference with Judge Parker at Charlotte, I am under the impression that it is not the intention of those holding these deposited securities to make a sale of all of them and convert them into cash pending the proceedings in the Supreme Court of the United States, but I think a restriction against such sale and conversion should be in the Order staying the mandate, so I am writing to ask that you and your associates join me in a letter to Judge Parker requesting that Paragraph 1 of the proposed Order be modified.

After further consideration of the change which you and I discussed and tentatively agreed upon on July 17th, I have come to the conclusion that it will accomplish what I have in mind. I suggest that the following words be inserted at the end of the first sentence of Paragraph 1, viz.,

"for purpose of preserving and protecting the said deposits, but this order shall not be construed to authorize the sale and conversion of any securities into cash for the sole purpose of liquidation, and no sale of securities shall be made except for the purpose of preventing loss to the estate of Fidelity Assurance Association pending the stay of mandate."

[fol. 482] It may be well to set out Paragraph 1 as it would be as so amended:

1. All cash, securities and other property heretofore deposited by Fidelity Assurance Association with various state officials and now in the possession and custody of state officials or receivers may be sold, invested, re-invested or kept uninvested as may be directed by state courts or state officials having control, supervision, or jurisdiction over said funds for the purpose of preserving and protecting the said deposits, but this order shall not be construed to authorize the sale and conversion of any securities into cash for the sole purpose of liquidation, and no sale of securities shall be made except for the purpose of preventing loss to the estate of Fidelity Assurance Association pending the stay of mandate.

I am sending you five carbon copies of this letter for your convenience in submitting the proposed change to Messrs. Eney, Farmer and the others.

I suggest that you request them to authorize you to join me in a letter to Judge Parker, which will ask that the proposed Order be so amended.

Very truly yours, (S.) John V. Ray.

JVR:MLB

[fol. 483]

EXHIBIT 5

July 21, 1942.

Mr. J. Campbell Palmer, III, c/o Koontz & Koontz, Union Building, Charleston, West Virginia.

In re: Sims, Auditor etc. vs. Fidelity Assurance Association, Case No. 4923

DEAR MR. PALMER:

I acknowledge receipt of your letter of July 20th, with which you returned to me the letter I wrote you on July 17th and the copies thereof.

The second paragraph of my letter of July 17th states my recollection of the statements made to Judge Parker by you and your associates. However, I see no reason why we should engage in any controversy as to what was said or what was not said on that occasion, because it was not my intention to agree that the Order of August 9th be modified so as to permit a sale of all the securities, and my object now is to get the proposed Order staying the mandate in that form.

I have, therefore, re-written the letter of July 17th, and enclose it to you herewith, dated July 20th.

Please do what you deem best to get authority from your associates to join me in a letter to Judge Parker requesting that the proposed modification be inserted in the consent Order.

Very truly yours, (S.) John V. Ray.

JVR:MLB  
Encl.

[fol. 484]

EXHIBIT 6

July 22, 1942.

Hon. John J. Parker, Judge, United States Circuit Court of Appeals, Fourth Circuit, Charlotte, North Carolina.

In re: Sims, Auditor, etc., vs. Fidelity Assurance Association

DEAR JUDGE PARKER:

I have a copy of Mr. John Ray's letter of July 18, 1942, to you, and am writing this in order to keep the record straight. I thought I said at the conference with you, and fully intended to say if I did not make it clear, that at the conference of the fifteen states held in Charleston prior to the conference with you, it was agreed amongst us that there would be no sale of assets made merely for the purpose of liquidation, but if there appeared to be a loss through market depreciation or other reasons, or if it appeared that an offer to sell was extremely good and not likely to be available again in the near future, that each state would be permitted to exercise its own judgment in making sales in that regard.

Mr. Ray conferred with me concerning the proposed change in the order, and I advised him that I could see that

it would add nothing to the order, but since he so earnestly desired it, I had no objection thereto on behalf of our clients, but could not attempt to speak for the other appellants in the case. They have been notified by me of the conversation with Mr. Ray and if they have no objections to the change, you will be so notified.

I trust that this will make the matter entirely clear.

Very sincerely, Koontz & Koontz, (S.) by J. Campbell Palmer, III.

JCP:H.

CC: Mr. John V. Ray, Mr. Rickard H. Lauritzen, Mr. Fyke Farmer, Mr. Vernon Eney, Mr. Rudolph K. Schurr, Mr. Ben C. Buckingham, Hon. W. S. Wysong.

[fol. 485]

EXHIBIT 7

(Letterhead of Armstrong, Machen, Allen & Eney,  
Attorneys and Counsellors at Law)

Baltimore, Maryland,

July 22, 1942

John V. Ray, Esq., Kanawha Valley Building, Charleston,  
West Virginia.

*In re: Fidelity Assurance Association*

DEAR MR. RAY:

I have just received a letter from Mr. Palmer in which he states that you saw him on last Friday and indicated that you were disturbed for fear that some of the states might liquidate their deposits immediately. Mr. Palmer has asked whether we would be willing to agree to a modification of the proposed order prepared in Charlotte on Monday of last week by inserting the following words at the end of the first sentence of paragraph 1 of the order:

"for the purpose of preserving and protecting said deposits, but this order shall not be construed to authorize the sale and conversion of any securities into cash for the sole purpose of liquidation, and no sale of securities shall be made except for the purpose of preventing loss to the estate of Fidelity Assurance Association pending the stay of mandate."

I can, of course, speak only for the Insurance Commissioner of Maryland, but on his behalf I would not be willing



to agree to the suggested change. I realize that the order prepared at Charlotte last week would authorize the liquidation by the various states of the deposited securities but I thought that all of us fully understood that this was the situation. It was certainly my understanding that the various states could proceed with liquidation of the assets and all administrative work looking towards the ultimate liquidation and distribution of the assets of Fidelity except only that no actual distribution to contract holders would be made while the Federal suit is still pending. In other words, I understood that in effect the injunction order of [fol. 486] August 9, 1941, was now limited to an injunction against distribution of the assets. This is borne out by paragraph 6 of the order left with Judge Parker last week.

Entirely apart from the fact that the suggested modification is a departure from what was agreed to last week, I would object to the same because of the difficulty in ascertaining at any particular time whether a sale is necessary in order to prevent loss. Who is to decide this question? Our theory in Maryland is that all of the assets should be liquidated promptly in order to prevent loss which may result from a decline in market values. We, of course, do not know what the situation will be six months or a year from now, but we do feel very strongly that since liquidation is inevitable, it should be accomplished promptly. I think I expressed these ideas as forcibly as possible at the hearing before Judge Parker last week.

I do not mean to indicate by what has been said above that the Maryland officials plan to dispose of their securities at once. We have no intention of dumping our securities on the market but on the contrary, expect to work out mutually satisfactory arrangements with other interested state officials to dispose of the securities as advantageously as possible. This will take time but we do not want to be hampered in these efforts by the indefinite language suggested in Mr. Palmer's letter which would possibly throw upon us an impossible burden of showing an actual impending loss before we could proceed with the sale of securities.

I am sending a copy of this letter to the other interested parties so that they may understand our position.

Very truly yours, (S.) H. Vernon Eney.

HVE/PS.

6582.

C.C. J. Campbell Palmer, III, Esq., Rudolph K. Schurr, Esq., Ben C. Buckingham, Esq., W. F. Gray, Esq., Dale Dunifon, Esq., Hardie Scott, Esq., George W. Bramer, Esq., Charles L. Rowe, Esq., Fyke Farmer, Esq., Richard H. Lauritzen, Esq., Earl B. Swarner, Esq., Thomas Herlihy, Jr., Esq., Blake T. Newton, Jr., Esq., J. W. Jones, Esq., W. S. Wysong, Esq.

[fol. 487]

## EXHIBIT 8

July 25, 1942.

Mr. J. Campbell Palmer, III, c/o Koontz & Koontz, Attorneys at Law, Union Building, Charleston, West Virginia.

*Re: Fidelity Assurance Association*

DEAR CAM:

The writer has received your letter relative to suggested change in the order to be signed by Judge Parker, and has also received letter from John V. Ray relative to the same subject matter.

It was the writer's understanding at our conference in Charleston, West Virginia, that we were to be able to do all things necessary towards liquidation but we were not to pay the claims of creditors pending the debtor corporation's appeal to the Supreme Court of the United States.

It was our specific understanding that we were to be able to sell any and all securities held and that we were to wait a reasonable time for the Sims committee to see if it could work out a sale of all the assets more advantageously than the same could be sold in individual blocks.

Were we to agree to John Ray's suggested amendment to the order this would tie our hands to the point where we are practically at the present time. Therefore, it is the writer's opinion and conclusion that we cannot agree to such an amendment and will resist the same if Mr. Ray insists that this order be amended.

For us to go further into detail would be merely repeating some of the reasons set forth in Vernon Eney's letter, which, you no doubt have.

Iowa, as agreed at the conference, does not intend to step out of bounds on the liquidation but will go along with the

rest of the states in order that the best interests of all may be attained.

Very truly yours, (S.) Ben C. Buckingham.

BCB:L.

CC—Farmer, Ray, Lauritzen, Schurr.

[fol. 488]

EXHIBIT 9

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH JUDICIAL  
CIRCUIT

Chambers of John J. Parker, U. S. Circuit Judge,  
Charlotte, N. C.

July 27, 1942.

Mr. John V. Ray, Attorney at Law, Charleston, W. Va.  
Mr. J. Campbell Palmer, III, Attorney at Law, Charleston,  
W. Va.

*Re: Sims v. Fidelity Assur. Ass'n, No. 4923*

GENTLEMEN:

Your letters of recent date were received at my office while I was away on vacation. They were forwarded to me, but the orders denying rehearing and staying mandate pending application for certiorari had always been entered. If you think that the order as entered should be modified as suggested in Mr. Ray's letter, please prepare and submit order to me.

With kind regards, I am

Sincerely yours, (S.) John J. Parker  
B

JJP/B.

[fol. 489]

EXHIBIT 10

August 1, 1942,

Hon. John J. Parker, Judge, United States Circuit Court of Appeals, Fourth Judicial Circuit, Charlotte, North Carolina.

*Re: Sims et al. vs. Fidelity Assurance Association Case No. 4923*

DEAR SIR:

I am perfectly satisfied with the order as agreed to by all counsel and as entered by the Court. Mr. Ray, not being satisfied, brought the matter to my attention, and I had personally no objections to the change. However, Mr. Eney of Maryland, Mr. Schurr of Missouri, Mr. Buckingham of Iowa, Mr. Lauritzen of Wisconsin, and Mr. Farmer of Tennessee, whom I notified of Mr. Ray's ideas of the proposed change, have written me that they are vigorously opposed to any such change and would like to be heard before the Court before any such change were made, if the Court felt it so advisable.

Therefore, while West Virginia has no objections to such change in the order, the other appellants each and all have objections thereto, and it is my thought that since the amendment would add nothing to that which is already in the order, we would be wasting the Court's as well as counsel's time in doing anything further in the matter.

Very sincerely, Koontz & Koontz, (S.) by J. Campbell Palmer, III.

JCP:H.

CC: Mr. John V. Ray, Mr. Rickard H. Lauritzen, Mr. Fyke Farmer, Mr. H. Vernon Eney, Mr. Rudolph K. Schurr, Mr. Ben C. Buckingham, Hon. W. S. Wysong.

[fol. 490] IN UNITED STATES CIRCUIT COURT OF APPEALS,  
FOURTH CIRCUIT

[Title omitted]

ORDER DIRECTING CLERK TO FILE MOTION TO BE CONSIDERED  
BY THE COURT AFTER NOTICE HAS BEEN DULY GIVEN TO  
COUNSEL OF RECORD—Filed August 8, 1942

Counsel for Fidelity Assurance Association having this day filed with the undersigned the attached motion; and it appearing that the motion is one which cannot be acted upon by the Senior Circuit Judge alone, but would have to be considered by the Circuit Court of Appeals:

It is ordered that the Clerk of the Circuit Court of Appeals file said motion to be considered by the Court after notice has been duly given to counsel of record. The motion will not be considered by the Court until its next term unless request therefor is specifically made.

Done at Charlotte, North Carolina, this the 7th day of August, 1942.

John J. Parker, Senior Circuit Judge.

[fol. 491] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER AUTHORIZING CLERK TO USE ORIGINAL TRANSCRIPT OF  
RECORD IN MAKING UP RECORD FOR USE IN THE SUPREME  
COURT OF THE UNITED STATES ON APPLICATION FOR WRIT OF  
CERTIORARI

For Reasons Appearing to the Court,

It is ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.



Further ordered that a copy of this order be incorporated in said certified transcripts of records.

January 9th, 1941.

John J. Parker, Senior Circuit Judge.  
[fols. 492-494] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 495] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

